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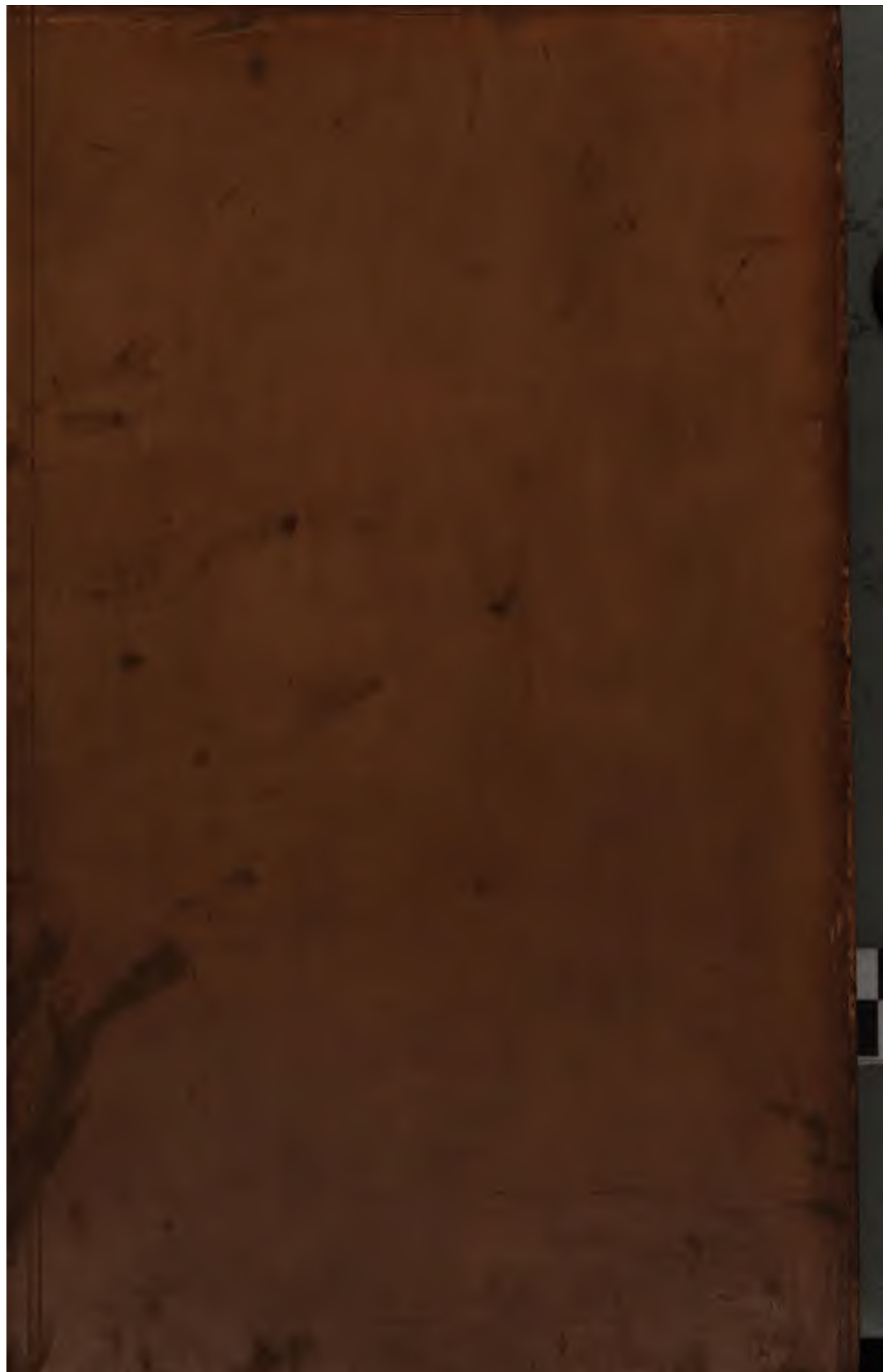
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R E P O R T S
OF
C A S E S
DECIDED IN THE
HIGH COURT OF CHANCERY,
BY
THE RIGHT HON. SIR LANCELOT SHADWELL,
VICE-CHANCELLOR OF ENGLAND.

BY NICHOLAS SIMONS,
Of Lincoln's Inn, Esq. Barrister at Law.

VOL. VII.
CONTAINING CASES IN 1834, 1835 & 1836,
WITH A FEW IN 1837.

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1837.



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CASES IN CHANCERY,

BEFORE THE

VICE-CHANCELLOR.

GOVETT v. RICHMOND.

1834:
8th May.

Laches.
Award.

ON the 1st of October 1829, the Plaintiff granted, to the Defendant *Richmond*, a Lease of certain Tithes, commencing on the 29th of September in the same year. In 1831 the Parties became mutually desirous of putting an end to the Lease; but disputes having arisen between them as to the Compensation which *Richmond* was entitled to for surrendering the Lease and as to other matters connected with it, they agreed, on the 2d of September 1831, to refer the matters in difference to Arbitration. On the 10th of November 1831, the Arbitrators made their Award, by which they directed that *Richmond* should receive all the Tithes accrued between the commencement of the Lease and the 29th of September 1831, that he should pay, to the Plaintiff, the Sum of 30 *l.*, being the Balance found, by the Arbitrators, to be due from him to the Plaintiff, after giving him credit for his Beneficial Interest in the Lease and for other Allowances, and that he should surrender the Lease to the Plaintiff.

A. having a claim on Property which he knew was the subject of a reference between *C.* and *D.*, suffered the Award to be made, without bringing forward his Claim. Held that he was bound by the Award.

Richmond having refused to perform the Award, the Bill was filed against him and one *Bignold*, (to whom
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1834-
 GOVETT
 v.
 RICHMOND.

Richmond, in June 1830, had agreed, in writing, to assign the Lease as a security for Money lent) praying for a Specific Performance of the Award, and that it might be declared that *Bignold* was not entitled to any Interest in or Lien upon the demised Premises.

It appeared that, in the early part of September 1831, *Bignold* knew that the Plaintiff and *Richmond* had agreed to the Reference, but did not inform either the Plaintiff or the Arbitrators that he had any Interest in or Lien upon the Lease or the demised Premises, until some time after the Award was made. He said, in his Answer, that, when he was informed of the Agreement for the Reference, he was resident at a distance in the Country, and without any professional assistance or advice, and that he took no notice of the Reference, not doubting that, under any circumstances, more would be awarded than would satisfy his demand, and that, at all events, he could not be prejudiced by a proceeding to which he was no Party.

Mr. *Rolfe* and Mr. *Kindersley*, for the Plaintiff, cited *Mocatta v. Murgatroyd* (a), *Watts v. Cresswell* (b), *Savage v. Foster*. (c)

Mr. *Knight* appeared for the Defendant *Richmond*; and

Sir *E. Sugden* and Mr. *Campbell* for the Defendant *Bignold*.

The *Vice-Chancellor* said that, where a Person having a claim upon Property which is the subject of a Reference, knows that the Arbitration is going on, but does not bring forward his Claim, he is bound by the Award.

(a) 1 P. W. 393. (b) 2 Eq. Ab. 515. (c) 9 Mod. 36.

CASES IN CHANCERY.

3

The Decree declared that the Plaintiff was entitled to a Specific Performance of the Award, and that *Bignold* was not entitled, as against the Plaintiff, to retain or hold any Charge or Lien upon the demised Premises, subsequent to the 29th of September 1831 ; and ordered the Defendants to execute to the Plaintiff an Assignment of the Lease.

1834.
GOVETT
v.
RICHMOND.

RAVENSHAW v. HOLLIER.

BY Articles of the 17th of March 1809, made in contemplation of the Marriage between *E. B. Symes* and *Mary Anne* the Daughter of *William Jemmett, W. Jemmett*, for himself and his Heirs, covenanted with *T. Hughes*, deceased, and *Henry Jemmett* the Son of *Wil-*

1834 :
3d & 5th June.
Covenant.
Lien.
Voluntary Deed.

A Father being seised of Estates in Tail and in Fee, on his Daughter's Marriage, covenanted with two Trustees, one of whom was his Son, to pay an Annuity to his Daughter, out of the Rents and Income of his Real and Personal Estates, and, by Deed or Will, to settle an Estate of 200*l.* a year, or, at his own election, 4,000*l.* in lieu of it, on certain Trusts for the benefit of his Daughter and her Husband and their Issue. By a subsequent Deed, the Father and Son, no other Person being a party, agreed to suffer a Recovery of the entailed Estates and to sell them and also the Fee Simple Estates, and that, out of the Proceeds, the Father's Debts (for some of which the Son was surety) should be paid, and that certain Sums should be taken by the Father and Son, for their own use, and that 4,000*l.* should be paid and provision made for the Annuity, pursuant to the Covenant on the Daughter's Marriage. A Recovery was accordingly suffered, and the Estates were limited to the Father and Son in Fee. The Father and Son afterwards agreed to abandon the last-mentioned Agreement, and, in consideration of the Son covenanting to pay the Father's Debts, the Estates were conveyed by them to the Son in Fee. The Son afterwards mortgaged the Estates comprised in the Recovery. Held that the Covenant for payment of the Annuity, created a Charge on the Estates, and that, the Mortgagee having had notice of that Covenant, the Premises were subject to the Annuity ; but that the Covenant to settle the Estate or 4,000*l.* in lieu of it, created no Lien or Charge on any of the Father's Estates, and that the subsequent Agreement between the Father and Son was merely voluntary and was fairly abandoned by them.

1834.
 RAVENSHAW
 v.
 HOLLIER.

liam Jemmett, to pay out of the Rents and Profits and Annual Income of his Real and Personal Estates, unto *E. B. Symes* and *Mary Anne Jemmett*, during their joint lives, and to the Survivor of them, during the life of such Survivor, in case *W. Jemmett* should so long live, the clear annual Sum of 50 *l.*; and that *W. Jemmett* would, by his Will or some Deed or Instrument in writing, devise or convey, to Trustees to be named by him, a Fee Simple Estate in Possession, in *England*, of the clear value of 200 *l.* per annum, free from Incumbrances, to be settled to the use of *E. B. Symes* for life, with Remainder to the use of *Mary Anne Jemmett*, for life, with Remainder to the Children of the Marriage as *E. B. Symes* and *Mary Anne Jemmett* should jointly appoint, and, in default thereof, as the Survivor of them should appoint, and, in default thereof, then to the use of all the Children of the Marriage, equally, as Tenants in Common in Fee, and, in case there should be no Child of the Marriage who should attain 21 or leave Issue, then to the use of such Persons as *Mary Anne Jemmett* should appoint, and, in default thereof, to the use of *Mary Anne Jemmett* in Fee: or, otherwise, that *W. Jemmett* would, in lieu of devising and settling such Estate, at his own election, by his Will or some Deed or Instrument in writing, bequeath or secure to Trustees to be named by him, the Sum of 4,000 *l.*, to be laid out and settled as near to the before-mentioned Uses as might be. And it was declared that the Settlement to be made, should be framed in the most full, explicit and liberal manner to effect the intent of the Parties, and with all usual and proper Limitations, Trusts, Clauses and Provisoos for that end.

By Articles of Agreement of the 4th of July 1810, made between *W. Jemmett* of the one part and *Henry Jemmett* of the other part, after reciting that *H. Jemmett* had, at the request of *W. Jemmett*, entered into several Securities with him for divers large Sums of Money, and that *W. Jemmett* was seised, in Fee Tail, of a Farm called *Cottesmore Farm* and other Hereditaments in *Little Milton*, and that he was also seised of an Orchard in *Little Milton* for his life, with Remainders to his first and other Sons successively in Tail General, and that he was also seised of several other Hereditaments in *Little Milton* and in *Great Milton* in Fee Simple, but subject, as to some parts thereof, to several Incumbrances, and that he had contracted with the Trustees under the Will of *Thomas Greenwood*, for the purchase of certain Lands in *Little Milton* and *Great Milton*, and of a Leasehold Messuage in *Little Milton*; and that, being desirous to pay the Sums for payment whereof *Henry Jemmett* was engaged with him and also all his other Debts, and to make some Provision for *H. Jemmett*, he had come to an Agreement with *H. Jemmett* that all the Real Estates of him *W. Jemmett*, and also the Estates for which he had contracted, should be sold, and that the Proceeds should be disposed of as therein declared; and that *W. Jemmett*, for the purpose of barring the Estate Tail in *Cottesmore Farm* and carrying into effect the purposes of the Agreement, had agreed to suffer a Recovery thereof, and also of the Orchard whereof he was seised for his life, in which Recovery *H. Jemmett* had agreed to join: *W. Jemmett* covenanted, with *H. Jemmett*, that it should be lawful for *H. Jemmett*, with his concurrence, to contract for the Sale of the Hereditaments in *Little Milton* and *Great Milton*, or to raise

1834.
RAVENSHAW
v.
HOLLIER.

1834.
 RAVENSHAW
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Money thereon for the purpose of carrying the Agreement into effect: and *W. Jemmett* and *H. Jemmett* covenanted with each other, that the Money arising from such Sales, after all Principal and Interest due on Mortgage affecting the Estates or to be charged thereon, should have been paid, should be paid into the hands of Messrs. *Walker & Co.* of *Oxford*, on a joint account of *W. & H. Jemmett*, or in the names of two other Persons to be mutually agreed upon by them, and that, in the first place, *W. Jemmett* should take out the Sum of 1,000 *l.* for his own use, and that, in the next place, all such Debts as were due from *W. Jemmett*, should be paid, and also the Costs of suffering the Recovery and of the now stating Deed and of the Sale of the Estates, and, in the next place, that the Sum of 11,000 *l.*, further part of the Monies arising from such Sale, should be invested on Government or Real Securities, in the names of two Trustees to be mutually chosen by *W.* and *H. Jemmett*, in Trust for *W. Jemmett* for life, and, after his decease, upon Trust to pay thereout 2,000 *l.* unto such Persons as *W. Jemmett* should, by Deed or Will, appoint, and, in default thereof, to the Executors or Administrators of *W. Jemmett*, and upon Trust to pay 4,000 *l.*, other part of the 11,000 *l.*, to the Trustees to be nominated pursuant to the Articles made on the Marriage of *E. B. Symes* with *Mary Anne* his Wife, and which *W. Jemmett* had thereby covenanted to pay out of his Real or Personal Estate, to be settled upon the Trusts declared by those Articles, and to pay the remaining 5,000 *l.* unto *H. Jemmett* his Executors, &c.; and, after the 11,000 *l.* should have been so raised, in the next place, out of the Monies arising from the Sale of the Estates, to raise a Sum sufficient for securing the payment of an Annuity of

50 l., which, by the same Articles, *W. Jemmett* had covenanted to pay to *E. B. Symes* and *Mary Anne* his Wife during the life of *W. Jemmett*, and which Sum should also be invested in the names of the Trustees to be nominated by *W.* and *H. Jemmett*, for the purpose of securing the payment of the Annuity, and the Principal, after the decease of *W. Jemmett*, to be paid to *H. Jemmett*, his Executors, &c. And it was thereby agreed that, until the Sale should take place, the Rents of the Estates should be received by *H. Jemmett*, and be by him applied as the Monies arising from the Sale were thereby directed to be applied.

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In pursuance of these Articles, an Indenture of Bargain and Sale was made, and a Recovery was suffered, whereby *Cottesmore Farm* and other Hereditaments in *Little Milton* were limited to the use of *W.* and *H. Jemmett* in Fee.

By an Indenture of the 25th of March 1811, *E. B. Symes* and his Wife, in pursuance of the Power given to them by the Marriage-Articles, made an appointment of the Premises thereby agreed to be settled, in favour of their Children, and, on failure of their Children, *Mary Anne Symes* appointed the same Premises for the benefit of *H. Jemmett* and his Children, with Remainder to *E. B. Symes* in Fee.

By Lease and Release of the 28th and 29th of February 1816, made between *W. Jemmett* of the first part, *H. Jemmett* of the second part, and *W. Mister* of the third part, after reciting the Bargain and Sale and Recovery, and that *W. Jemmett* was entitled, in Fee Simple, to other Hereditaments in *Little Milton* and

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Great Milton, but subject, as to some parts thereof, to several Incumbrances, and that *W. Jemmett* was indebted to divers Persons in various Sums, which, or a principal part whereof, were set forth in the first Schedule thereto, and that *W. Jemmett* and *H. Jemmett* had, theretofore, entered into different Agreements for selling the Estates comprised in the Bargain and Sale and Recovery and also the Fee Simple Estates of *W. Jemmett*, and applying the Money to be produced thereby in payment of the Debts of *W. Jemmett* and for certain further purposes for the benefit of *W.* and *H. Jemmett*, but all such Agreements were then meant to be relinquished and abandoned, and, in lieu thereof, they had agreed that *H. Jemmett* should pay, with his own Monies, all the Debts of *W. Jemmett* and should indemnify him therefrom, and also that *H. Jemmett* should pay to *E. B. Symes* and *Mary Anne* his Wife, during the joint lives of *W. Jemmett* and *Mary Anne Symes*, an Annuity of 50 l., and that, in consideration of the Premises, *W. Jemmett* should convey his Share and Interest in the Hereditaments comprised in the Bargain and Sale and Recovery, and also the Entirety of the Fee Simple Hereditaments belonging to him in *Little Milton* and *Great Milton*, subject to the Charges affecting different parts thereof, to the Uses therein declared for the sole benefit of *H. Jemmett*, his Heirs and Assigns: It was witnessed that, in consideration of the Release thereafter made, by *W. Jemmett*, of the Hereditaments thereafter described, *H. Jemmett* covenanted, with *W. Jemmett*, that he, his Heirs, &c., would pay all the Debts of *W. Jemmett* set forth in the Schedule, and would indemnify him therefrom, and also that *H. Jemmett* would pay to *E. B. Symes* and *Mary Anne* his Wife, and to her if she should survive her Husband,

from thenceforth, during the joint lives of *Mary Anne Symes* and *W. Jemmett*, an Annuity of 50 l.: And, in consideration of the Covenant entered into by *H. Jemmett*, *W.* and *H. Jemmett* conveyed the Hereditaments of which they were jointly seised in Fee, and *W. Jemmett* conveyed the Hereditaments of which he was solely seised in Fee, subject to the Incumbrances thereon, to *Mister* and his Heirs, to such uses as *H. Jemmett* should appoint, and, subject thereto, to the use of *H. Jemmett* in Fee: And *W.* and *H. Jemmett* released each other from all Agreements by them entered into and interchanged prior to the date of the Release, and from all Monies payable and Acts to be done by virtue of such prior Agreements.

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By Indentures of the 2d and 3d of January 1818, and made between *H. Jemmett* of the one part and the Plaintiff of the other part, after reciting the Deeds of February 1816; *H. Jemmett*, in pursuance of the Power thereby reserved to him, appointed and also conveyed *Cottesmore Farm* and certain of the other Hereditaments, to the use of the Plaintiff in Fee, for securing, by way of Mortgage, 8,000 l. and Interest. By an Indenture of even date, after reciting the Marriage-Articles, and that *W. Jemmett*, at the time of entering into those Articles, was seised in Fee Tail in possession of the Premises comprised in the Mortgage, and also reciting the Bargain and Sale and Recovery and the Deeds of February 1816 and the Mortgage to the Plaintiff, *H. Jemmett* demised certain Hereditaments of which he was seised in Fee, to a Trustee, for 500 years, upon certain Trusts for indemnifying the Plaintiff and the mortgaged Premises, from all Claims on account of the Marriage-Articles or any of the Covenants of *W. Jemmett* therein contained, and, all

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Actions and Suits on account of the same, or the breach or non-performance thereof or in anywise relating thereto.

Mary Anne Symes and *W. Jemmett* having died, and the Issue of the Marriage having failed, and *Symes* having taken the Benefit of the Insolvent Debtors' Act, the Bill was filed, against him and *Hollier*, his Assignee, and against *H. Jemmett*, charging that the Covenants in the Marriage-Articles were mere Personal Covenants on the part of *W. Jemmett*, and did not, as against the Plaintiff, create any specific Liens or Charges upon the Mortgaged Premises; that the Covenants in the Articles of 1810 were mere private and voluntary Agreements between *William* and *Henry Jemmett*, and that no Person claiming under the Marriage-Articles was privy thereto or could claim to enforce the performance thereof: that the Articles of 1810 were never acted upon, but were abandoned and other arrangements substituted in lieu thereof by the Deeds of February 1816. The Bill prayed that the Plaintiff might be declared entitled to the benefit of his Mortgage discharged from, or, at all events, in priority to the Defendants claiming under the Marriage-Articles, and that the Defendants might redeem the Mortgage or be foreclosed.

Symes, by his Answer, submitted whether the Covenants in the Marriage-Articles were mere Personal Covenants on the part of *W. Jemmett*, or whether the same did or not create specific Liens or Charges upon the Mortgaged Premises, as against the Plaintiff: and he insisted that, whether those Covenants were or not mere Personal Covenants, or did or not create specific Liens or Charges upon the Mortgaged Premises as

against the Plaintiff, yet the Articles of 1810, having been made in pursuance of the Marriage-Articles, the Covenants therein contained did create a specific Lien or Charge on the Premises therein comprised; and that the Plaintiff, having had notice, by the recitals in the Deed of Indemnity, of the said Marriage-Articles, ought to have inquired whether any act had been done in performance of them, whereby it would have appeared that the Articles of 1810 had been executed; and that the Plaintiff ought, therefore, to be considered as having had notice of the Articles of 1810, whereby a specific Lien or Charge was created, upon the Mortgaged Premises, for the Annuity and for raising the 4,000 *l.*, and, therefore that the Defendant was entitled to have Provision made, out of the Mortgaged Premises, for payment of the Arrears of the Annuity due at *W. Jemmett's* death, and for settling an Estate of 200 *l.* a year, or the 4,000 *l.* in lieu of it. And he further insisted that the Covenants in the Articles of 1810, were not mere private and voluntary Agreements between *W.* and *H. Jemmett*; for though no Person entitled to the benefit of the Marriage-Articles was a Party to the Articles of 1810, yet those Articles were made in pursuance of the Marriage-Articles, and *H. Jemmett*, the Party with whom the Covenants thereby made were entered into, being himself a Trustee of the Marriage-Articles, such Covenants were not merely voluntary or revocable, but all Parties interested under the Marriage-Articles, could claim to enforce the performance of them, and that the provisions of the Articles of 1810, were not and could not be superseded or abandoned, without the consent of the Parties interested under the Marriage-Articles: and he insisted

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that the Plaintiff was not entitled to the benefit of his Mortgage in priority to the Parties claiming under the Marriage-Articles.

Sir *E. Sugden* and Mr. *Girdlestone*, for the Plaintiff:

There is nothing, in the Marriage-Articles, to bind any particular Estate. *William Jemmett* had the whole of his life to perform the Covenant to convey an Estate of the value of 200 *l.* a year, or to settle 4,000 *l.* in lieu of it, and, therefore, no Person could have enforced the performance of that Covenant in *W. Jemmett's* lifetime. *Prebble v. Boghurst (a)*. When he entered into that Covenant, he was Tenant in Tail only of the Mortgaged Premises. The Articles of 1810 amounted only to an Agreement, between the Father and Son, as to the manner in which the Proceeds of their joint Estate should be disposed of. No Person could have filed a Bill to enforce that Agreement as against the Father and Son: no other Person was a party to it, nor was it communicated to any one: it is, therefore, impossible to contend that, by that Deed, any Trust was created in favour of Mr. and Mrs. *Symes*. Besides, under the Marriage-Articles, *William Jemmett* had the power of substituting the 4,000 *l.* for the Estate: and, by the Deed of 1810 he elected to pay the Money instead of settling the Estate. The Agreements contained in the Deed of 1810, were mere private and voluntary Agreements between the Father and Son; and those Agreements were wholly put an end to by the Deeds of 1816. *Walwyn v. Coutts (b)*, *Garrard v.*

(a) 1 Swans. 309; see 321.

(b) 3 Mer. 707; and *ante*, Vol. 3, p. 14.

Lord Lauderdale (c). The Deed of Indemnity (which was taken *a majori cautelâ*) gave notice, not of the Articles of 1810, but of the Articles of 1809: by those Articles, however, no Charge was created.

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Mr. *Knight* and Mr. *Rudall*, for the Defendant
Symes:

There are two questions in this Case: first, whether the Covenant to pay the Annuity, created a charge on the Estates of which *W. Jemmett* was then seised: second, whether the Covenant to convey an Estate of 200 *l.* a year, created a charge on those Estates.

First: As *W. Jemmett* covenanted to pay the Annuity out of the Rents, Profits and Income of his Real and Personal Estates, it is clear that the Annuity was a charge on his Estates.

Secondly: The Covenant to convey the Estate of 200 *l.* a year, created a Lien or Charge on his Estates, which attached on the suffering of the Recovery. *Roundell v. Breary* (d). That Case decides the present. *Prebble v. Boghurst* has no application. That Case arose on a Bond conditioned for settling *all* the Estates of which the obligor *should become seised* (e). In the Articles of 1810, *W. Jemmett* expressly states that he intended to satisfy the Covenant of 1809 out of his Real or Personal Estate; so that he puts his own construction on that Covenant.

(c) *Ante*, Vol. 3, p. 1. See also *Acton v. Woodgate*, 2 M. & K. 492.

(d) 2 Vern. 482.

(e) See also *Needham v. Smith*, 4 Russ. 318, and *Needham v. Kirkham*, 3 B. & Ald. 531.

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[The *Vice-Chancellor*:—I do not think that the words in the Deed of 1810, accurately represent the effect of the Articles of 1809.]

The Deed of 1810 expressly charges the Estates with the 4,000 *l.*: and, if *W. Jemmett* had died the day after the Deed of 1810 was executed, the Parties claiming under the Articles of 1809, might have filed a Bill to have the Trusts of the Deed of 1810 carried into execution. *Walwyn v. Coutts* and *Garrard v. Lord Lauderdale* have no applicat. 1: for *H. Jemmett* was actually a Creditor of his Father; and, therefore, the Deed of 1810 was not voluntary: and we have a right to consider that Deed as perfecting the Articles of 1809. Besides, the Agreement of 1810 was carried into effect, in part; for the Father and Son suffered a Recovery and declared the uses to themselves in Fee.

By the Deeds of 1816, *W. Jemmett* conveyed away all his Estates and left himself destitute: so that, unless the Articles were a charge on his Estates, he committed a fraud on those Articles: for it is not competent to a Party who has entered into a Covenant, to deprive himself of the means of performing it. The Release of 1816 recites that the Estates were subject, as to some parts thereof, to several Incumbrances, and that different Agreements had been entered into, between the Father and Son, for selling the Estates and for certain further purposes; and the Father and Son release each other from all Agreements by them entered into and interchanged prior to the date of the Release. The language of this Deed cannot be satisfied without referring to the Deed of 1810. The Deed of 1809, too, was a Deed which, in its nature, rendered it extremely pro-

bable that something would be done in pursuance of it: so that, at all events, there was sufficient to put the Plaintiff on inquiry: if, therefore, the Plaintiff had not actual notice, he had, at least, constructive notice of the Articles of 1810. *Ferrars v. Cherry (f)*, *Randall v. Lewis (g)*, *Jones v. Martin (h)*. *H. Jemmett* was a Trustee under the Articles; and it was a Breach of Trust in him to abandon the devotion of the Property which he had obtained in favour of his *cestuique* Trust: and a party taking with notice of a Breach of Trust, is, himself, affected by the Trust.

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The *Solicitor-General* and Mr. *Hayter* appeared for the Defendant *Hollier*.

Mr. *Kindersley* for the Defendant *H. Jemmett*.

The VICE-CHANCELLOR:

By the Articles of 1809, *W. Jemmett* covenanted to pay the Annuity of 50 *l.*, out of the Rents and Profits and annual Income of his Real and Personal Estate. Those words were, I think, quite sufficient to charge all the Estates of which *W. Jemmett* was seised; and, consequently, the Estate in question would be chargeable, in Equity, with the Annuity. He then covenants to devise or convey a Fee Simple Estate in possession of the clear value of 200 *l.* per annum, to the Uses after mentioned, or, instead of devising and settling such Estate of the clear annual value of 200 *l.*, at his own election, to give and bequeath or otherwise secure to

(*f*) 2 Vern. 383. In *Senhouse v. Earle*, Amb. 285, Lord *Hardwicke*, as is observed by Mr. *Raithby*, in a note to the Case cited, denied the authority of that Case.

(*g*) 5 Ves. 262. (*h*) Ibid. 266, note.

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Trustees, the Sum of 4,000 *l.* to be laid out and settled as near to the Uses before-mentioned as might be. With respect to this Covenant my opinion is that it was not the intention of *W. Jemmett* to bind all or any of the Estates of which he was seised: and it is, I think, perfectly clear that he did not intend to create any Lien or Charge on the Mortgaged Estate, of which he was merely Tenant in Tail at the date of the Articles.

Then I come to the Deed of 1810. [His *Honor* here stated the substance of that Deed.] This appears to me to have been a mere voluntary Agreement between the Father and Son, who were dealing with their own Property and pointing out, as between themselves, the mode in which that Property should be disposed of. Then, by the Deeds of 1816, they come to a different arrangement, the effect of which is that, in consideration of the Son covenanting to pay his Father's Debts and the Annuity 50 *l.*, the Estates are conveyed to the Son in Fee. And, according to the principle of *Walwyn v. Coutts* and *Garrard v. Lord Lauderdale*, it was, I think, competent to the Father and Son to defeat the prior Agreement and to settle their Estates in what manner they pleased. The consequence is that, if the Plaintiff had notice of the Deed of 1810, he would not be affected by it.

Declare that the Plaintiff is entitled to the benefit of his Mortgage discharged from all Lien or Claim in respect of the Covenant, in the Articles of 1809, to settle an Estate of the value of 200 *l.* a year, or the Sum of 4,000 *l.* in lieu of it; but subject to the Covenant to pay the Annuity of 50 *l.**

* Affirmed by Lord *Lyndhurst*, C. 4 April 1835.

BAKER v. BRAMAH.

THE Bill was filed for a Discovery in aid of the defence to an Action. The Prayer of Process contained the words: "Stand to and abide such *Order* therein as to your Lordship shall seem meet:" and, on that account, the Plaintiff demurred.

Mr. *Wigram* and Mr. *Bird*, in support of the Demurrer, cited *Rose v. Gannel* (a), and *Ambury v. Jones* (b).

Mr. *Richards*, in support of the Bill, said that there was no Case which decided that the word *Order*, in the Prayer of Process, without the word *Decree*, rendered a Bill of Discovery demurrable: that the Plaintiff might want an Order for production of Documents, or for an Attachment for want of Answer, or for a Reference for Insufficiency.

Mr. *Wigram*, in reply, said that the words *Order* and *Decree*, were synonymous.

The VICE-CHANCELLOR:

The Cases decide that, if the Prayer of Process to a Bill of Discovery asks that the Defendant may stand to and abide such Order and Decree as to the Court shall seem meet, the Bill is Demurrable. But, where the word *Decree* is omitted, the word *Order* must be considered as meaning such an Order as is consistent with the general scope of the Case made by the Bill: and, therefore the Demurrer must be overruled.

(a) 3 Atk, 439.

(b) 1 Younge, 199. See *James v. Herriott*, ante, Vol. 6, p. 428.

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11th June.

Bill of Discovery.
Demurrer.

The word *Order*, without the word *Decree*, in the Prayer of Process to a Bill of Discovery, does not render the Bill demurrable.

1834:
25th & 27th
Junc.

Demurrer.
Parties.

A. bequeathed a Reversionary Interest expectant on his Wife's death, in a Sum of Stock, to *B.* *B.* bequeathed it to *C.* and *C.* bequeathed it to *D.*, who, on the death of *A.*'s Wife, filed a Bill against the Trustees to have the Stock transferred to him, alleging that the Executors of *A.* and *B.* & *C.* had successively assented to the Bequests. Held that the Executors were not necessary Parties.

SMITH v. BROOKSBANK.

THE Bill stated that *Richard Braine*, having, under his Marriage Settlement, power to dispose by Will, of the Reversion expectant on his Wife's death, of 5,000 *l.* Consols, (which, when the Bill was filed, were standing in the names of the Defendants *Brooksbank* and *Yewd*) by his Will dated in 1807, duly appointed and bequeathed 1,000 *l.* Consols, part of that Fund, to his Brother *Thomas Braine*, and appointed, his Wife, *Eliza Braine* and *William Dunn* his Executors: that the Testator died in 1811, and his Widow alone proved his Will, paid his Debts, &c., and assented to the Legacy: that *Thomas Braine*, by his Will dated in 1810, bequeathed his Reversionary Interest in the 1,000 *l.* Consols, to his Wife, *Elizabeth Braine*, and made her his sole Residuary Legatee: that *T. Braine* died in 1811, and Letters of Administration with his Will annexed were granted to his Widow, who paid his Debts, &c., and assented to the Bequest of the 1,000 *l.* Consols: that *Elizabeth Braine* died in 1818, having, by her Will dated in 1815, bequeathed her Reversionary Interest in the 1,000 *l.* Consols to her Six Children, and directed that the Issue of such of them as should die in her lifetime, should take their deceased Parent's share, and she appointed her Son, *Joseph Braine*, and *William Hands* and *Thomas Halford* her Executors, and they proved her Will, paid her Debts, &c., and assented to the Bequest of the 1,000 *l.* Consols, and, particularly, to the Bequest of One-sixth part of that Sum for the benefit of *Eliza Smith*, one of the Testatrix's Daughters, and

her Issue: that *Eliza Smith* died in her Mother's lifetime leaving the Plaintiffs and the Defendant *Charles Smith* (who was out of the Jurisdiction of the Court) her Children and only Issue her surviving: that *Eliza Braine* died in 1827, and, thereupon, the Legatees under the Will of *Elizabeth Braine* became entitled to have their Shares of the 1,000 *l.* Consols transferred to them: and that the Trustees had transferred Five-sixths of that Sum to the Children of *Elizabeth Braine* who survived her. The Bill prayed that the Plaintiffs and the Defendant *Charles Smith* might be declared to be entitled to One-sixth of the 1,000 *l.* Consols, and that their Shares might be transferred to them.

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The Trustees demurred, because neither the Executors of *Elizabeth Braine*, nor any personal Representative of *Thomas Braine* were Parties to the Bill.

Sir *E. Sugden* and Mr. *Heathfield*, for the Demurrer, said that the Estates of the different Testators could not be wound up in the absence of their Personal Representatives, and that it was necessary to have them before the Court in order to prove that they had assented to the Bequests. *Moor v. Blagrove (a)*.

(a) 1 Ch. Ca. 277. The following is an extract of the Case cited, from Reg. Lib.

Trin. 28, Car. 2, 1676. Jovis 8 Junii.

Atkins Moore, infans, P. *Howd. Thorpe*, Guard, Su.

q.

Humfrey Moore, *John Blagrove* and *Thomas Hilliard*,
Defts.

This Matter, upon the Defendants' Demurrer put into the Plaintiff's Bill, coming on this present day to be heard and

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SMITH
r.

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Mr. *Wigram* and Mr. *Hare*, for the Bill, said that, as *Elizabeth Braine*, who was both the Residuary Legatee and Personal Representative of *Thomas Braine*, had disposed of her Interest in the 1,000 *l.* Consols, at all events, the Personal Representative of *Thomas Braine* could not be a necessary Party: and that as the Bill

debated in the presence of Counsel on both sides, the Case made upon the Plaintiff's Bill, being that *John Atkins*, the Plaintiff's Grandfather, 30th May 1656, by his Will, in writing, bequeathed a Lease of a House and Wharf, in *Reading*, in *Berks*, for a long Term yet to come, unto the Plaintiff, and made *George Lambert*, *William Castell* and *Howd Bold* Executors, who proved the Will, and that the Defendant, as Guardian to the Plaintiff, being the Defendant's [qy. Plaintiff's] Father, entered on the Premises, and took the Profits hitherto, and hath cancelled the old Lease, and, by combination with the Defendant *Hilliard*, hath taken a new Lease, in his own name, from the Defendant *Blagrove*, who is the owner of the Reversion and Inheritance of the Premises, and refuses to account with the Plaintiff's now Guardian for the Profits received, pretending that the Plaintiff hath not right to the Premises until he attained the age of 20 years, he being not above 19. Whereunto the Defendants demurred, for that it appears of the Plaintiff's own showing, by his Bill filed in January last, that the Will was made in May 1656, and that the Complainant was not above 19 years old at the putting in of his Bill, for that the Will was made long before the Complainant was born, and the Complainant neither was nor is the Person named in the said Will as Legatee, neither hath the Plaintiff made the Executors of the said *John Atkins* parties to his Bill. Whereupon, and upon hearing of what was insisted on by the Counsel on either side, and for that the said Executors are not Parties to the said Bill, His Lordship held the said Demurrer to be good and sufficient, and doth order the same do stand and be allowed, with ordinary Costs, to be paid to the Defendants in respect thereof. (*Reg. Lib.* 1675, B, fo. 562.)

alleged not only that all the Executors had successively assented to the Bequests, but that the Trustees had transferred Five-sixths of the 1,000 *l.* Consols to the Children of *Elizabeth Braine* who survived her, it was not necessary to make any of the Executors Parties to the Bill.

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The VICE-CHANCELLOR :

I must consider this point before I decide it. My present Opinion is that the Demurrer is not good.

THE *Vice-Chancellor*, after stating the Case, said that he had looked at the Report of *Moor v. Blagrove*, and that it did not clearly appear whether that Case was decided on Demurrer, or on the hearing of the Cause (*b*): that, if it was decided on the hearing, the assent of the Executor might not have been proved, and that, at all events, he was not disposed to follow that Case, as the allegation in the Bill that the Executors had assented to the Bequests, must, for the purposes of the Demurrer, be considered as tantamount to proof of that fact at the hearing; and, therefore, that the Demurrer must be overruled.

27th June.

(*b*) From the extract of that Case from Reg. Lib. (see note (*a*)) the Case appears to have been decided on Demurrer; but it does not appear that the assent of the Executors was alleged in the Bill.

1834 :
25th & 27th
June.

*Alimony.
Husband and
Wife.*

Whether a Bill
by the Execu-
tors of a married
Woman, against
her Husband,
to recover Ar-
rears of Ali-
mony due at her
death, is sus-
tainable. *Qu.*

STONES v. COOKE.

THIS was a Suit by the Executors of the Defendant's late Wife, for an account and payment of Arrears due, at the Wife's death, for Alimony which the Defendant had been ordered, by a Decree of the Ecclesiastical Court, to pay to her.

The Defendant put in a general Demurrer.

Mr. *Knight* and Mr. *Errington* in support of the Demurrer :

Courts of Equity have no jurisdiction with respect to Alimony, except to grant a Writ of *Ne Exeat* against the Husband. Although it is not an Equitable Debt, it is a Debt which is not recoverable at Law ; and, therefore, Courts of Equity will grant a *Ne Exeat* : but there is no Case in which those Courts have gone on to decree an Account and payment of Alimony. The proper course is to proceed in the Ecclesiastical Court. That Court must possess the means of enforcing its own Decree : and it is not stated that there is any impediment or fraud in this Case, which renders the interference of this Court necessary.

As the Wife is dead, the purpose for which the Alimony was decreed, has ceased ; and, consequently, the Arrears are not now recoverable (*a*).

(*a*) See *Haffey v. Haffey*, 14 Ves. 261, and the Cases referred to in the note.

Sir *E. Sugden* and Mr. *Walker*, in support of the Bill.

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STONES
v.
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Courts of Equity always have been ancillary to enforce the Orders of the Ecclesiastical Court for Alimony. They will not procure Bail and there stop. The Party cannot be discharged without satisfying the demand. If Courts of Equity will enforce Articles of Separation, which are mere private Agreements, *a fortiori* they will enforce an Order of the Ecclesiastical Court.

The jurisdiction of the Ecclesiastical Court ceases on the death of the Wife: therefore, her Executors are wholly without remedy, unless this Court will assist them. There is no distinction between a Debt like the present, and an Equitable Debt.

At all events, the question is of too much importance to be decided on Demurrer.

The *Vice-Chancellor* said that he should reserve his Judgment until he had consulted the Judges of the Ecclesiastical Court.

On this day, His *Honor* said that he had had an opportunity of taking the best opinions which the present state of the Law could furnish, upon the question raised by the Demurrer; and, though they were not very satisfactory, the better opinion seemed to be that the Ecclesiastical Court would allow the Wife's Executors to enforce payment of the Arrears of Alimony, against the Husband. If that were so, the present Bill was not necessary, as the principle on

27th June.

1834.

STONES

v.

COOKE.

which the Court grants a *Ne Exeat* against the Husband, is that the Ecclesiastical Court has no power to compel him to give Bail. But His Honor added that it was not so clear that the Ecclesiastical Court would, in a case like the present, decree an Account and payment of the Arrears of Alimony, as to justify him in allowing the Demurrer; and therefore he should overrule the Demurrer, but reserve the Costs of it.

1834:

26th June.

*Insolvent
Debtor.**Demurrer.
Jurisdiction.*

A Bill by an Insolvent, to set aside an Assignment by his Assignee of his Interest under his Father's Will, stating a special case of Collusion between the Assignee and the Executors, is not demurrable.

BARTON v. JAYNE.

THE Plaintiff was one of the Children and Residuary Legatees of *Richard Barton*, deceased, and the Defendants were *N. Jayne* and *B. Tapley*, the Executors and Trustees of *R. Barton's* Will, *Ann Barton*, the only other surviving Child and Residuary Legatee of *R. Barton*, and *W. Sims*, who had been chosen the Assignee of the Plaintiff's Estate under the Insolvent Debtors' Act, in the place of the original Assignee, who had died. The Bill, after charging *Jayne* and *Tapley* with having done various Acts in violation of their duty as Executors and Trustees, alleged that the Plaintiff's Debts under his Insolvency, amounted to between 300 *l.* and 400 *l.* only: that his Share of his late Father's Estate, if recovered, would be sufficient to pay the whole of such Debts and to leave a very considerable Surplus for the Plaintiff; but *Sims*, acting in collusion with the other Defendants, declined to take any proceedings for enforcing an Account and payment of such Share; that if (as was pretended)

Sims had executed any Deeds whereby the Plaintiff's Interest in the matters in question in the Suit, had been assigned or released to the other Defendants, such Deeds were fraudulent and void as against the Plaintiff: that, about August 1833, the Plaintiff made application to *Jayne* and *Tapley* for an Account of his Father's Estate, and divers communications took place between them, and *Jayne* offered to give the Plaintiff 100 *l.* for his Interest in such Estate, which the Plaintiff declined and threatened to commence Proceedings in Equity against *Jayne* and *Tapley*, unless proper Accounts were rendered to him: that they, being well aware of the improper and irregular manner in which they had acted in regard to the Testator's Estate, were very desirous to prevent the institution of any such Proceedings, and therefore they formed a plan for procuring an Assignment and Release of the Plaintiff's Interest from an Assignee under his Insolvency, and, with that view, *Jayne* applied to *Sims* (who was a Creditor of the Plaintiff for 14 *l.*) to consent to become the Plaintiff's Assignee, representing that *Jayne* had about 200 *l.* to pay over to the Assignee when chosen, and a meeting of Creditors was held, at which *Jayne* and *Sims* were the only Creditors present, and *Sims* was chosen Assignee, and he was, afterwards, induced, as it was alleged, to execute some Deeds purporting to assign the Plaintiff's Interest in the Testator's Estate to *Ann Barton* for 100 *l.*, and purporting to release the other Defendants, upon receiving 50 *l.* from *Jayne*; but the Plaintiff charged that no Agreement for such pretended Purchase was made between *Sims* and *Ann Barton*, and that *Sims* was not informed or aware of the nature, amount, or value of the Property purported to be assigned to her, or of the Rights

1834.

BARTON

v.

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and Interests released to the other Defendants, and no account of the Testator's Estate was produced to him; that *Jayne's* Solicitor acted for *Sims* throughout the transaction, and, in fact, *Sims* acted entirely by the direction and with a view to meet the wishes of *Jayne* and the other Defendants, and that it was fully understood and admitted, as the fact was, that such Deeds were prepared as a mode for relieving *Jayne* and *Tapley* from the responsibility which they had incurred in respect of the Testator's Estate; that the 100*l.* alleged to have been given by *Ann Barton*, was, in fact, paid or advanced by *Jayne*, part thereof being paid by his Promissory Note, and his Solicitor obtained possession of the chief part of the pretended Consideration for the Assignment and Release.

The Bill prayed that the Trusts of the Will might be carried into execution, and for an Account of the Testator's Personal Estate come to the hands of *Jayne* and *Tapley*, and that they might be discharged from the Trusts of the Will and be ordered to pay the Costs of the Suit, and that new Trustees might be appointed, and that the Deeds alleged to have been executed by *Sims* to the other Defendants, might be declared Fraudulent and Void and be delivered up to be cancelled.

The Defendant, *Jayne*, put in a general Demurrer.

Mr. *Knight* and Mr. *James Parker*, in support of the Demurrer, contended that the Court of Chancery had no jurisdiction in this Case, but that, as in Bankruptcy, if an Assignee misconducts himself, the proper course is to apply to the Commissioner to remove him, so, in this Case, the proper course was to apply to the In-

solvent Debtors' Court for the removal of the Assignee ; that no Case could be found in support of the Bill ; and that there was no allegation that the Consideration for the Deeds was inadequate. *Spragg v. Binkes (a)*, *Benfield v. Solomons (b)*, *Saxton v. Davis (c)*, *Hammond v. Attwood (d)*, *Tarleton v. Hornby (e)*.

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BARTON
v.
JAYNE.

Sir *E. Sugden* and Mr. *Jacob*, for the Plaintiff, contended, first, that the Case of Collusion stated in the Bill, between the Assignee and the other Defendants, was sufficient to support it: secondly, that the Insolvent Debtors' Court had no power to set aside Deeds.

THE VICE-CHANCELLOR :

There is so much difficulty about the question as to the effect of a Charge of Collusion in a Bill like the present, that I am averse to suppress this Suit: especially as I think that the Bill states such a Case of Collusion as, in the opinion of Lord *Eldon (f)*, would be sufficient to maintain it. I think, therefore, that it is proper that the Bill should be answered.

Demurrer overruled.

(a) 5 Ves. 583.

(c) 18 Ves. 72. S.C. 1 Rose, 70.

(b) 9 Ves. 77.

(d) 3 Madd. 158.

(e) 1 Youn. & Coll. 172. The following sections of the Insolvent Debtors' Act (7 Geo. 4, c. 57) were referred to in the course of the argument: Sections 24, 36, 37 & 38.

(f) See 18 Ves. 81. *Qu.* Whether the Bill might not have been maintained on the second ground also (namely), that the Insolvent Debtors' Court has no power to set aside Deeds.

1834:
10th June.

*Answer.
Purchaser for
valuable Con-
sideration.*

A Purchaser for
valuable Con-
sideration who
submits to an-
swer, must an-
swer fully.

THE EARL OF PORTARLINGTON v. SOULBY.

THE Plea put in in this Case having been ordered to stand for an Answer with liberty to except (a), the Plaintiff excepted accordingly. The *Master* allowed the Exceptions; upon which the Defendant excepted to his Report.

Mr. *Rolfe* and Mr. *Sidebottom* in support of the Exceptions, contended that a Purchaser for valuable Consideration did not fall within the general rule, but might, by Answer, protect himself from answering fully; and that the Case of *Ovey v. Leighton* (b), was contrary to prior decisions: and they relied on *Jerrard v. Saunders* (c), *Rowe v. Teed* (d), and *Leonard v. Leonard* (e).

The *Solicitor-General* and Mr. *Bagshawe*, for the Report.

The *Vice-Chancellor* said that the Rule laid down in *Ovey v. Leighton*, that a Purchaser for valuable Consideration who submits to answer, must answer fully, was correct, and overruled the Exceptions.

(a) See *ante*, Vol. 6, p. 356.

(d) 15 Ves. 372.

(b) 2 Sim. & St. 234.

(e) 1 Ball. & Beatt. 323.

(c) 2 Ves. Jr. 454.

GORDON v. HOFFMANN.

1834 :
11th June.

TESTATOR, by his Will, gave to his Son a Legacy of 3,000 *l.* and, by a Codicil, a Legacy of 4,000*l.* in addition to the Legacy of 2,000 *l.* given by his Will.

Will.
Construction.

The Bill was filed by Legatees under the Will, praying that it might be declared that the Son was entitled to a Legacy of 2,000 *l.* only, in addition to the Legacy given by the Codicil.

Testator, by his Will gave to his Son a Legacy of 3,000*l.*, and, by a Codicil, a Legacy of 4,000*l.*, in addition to the Legacy of 2,000*l.* given by his Will. Held that the Son was entitled to the Legacy of 3,000*l.* in addition to the Legacy of 4,000*l.*

The *Vice-Chancellor* held that the Son was entitled to the Legacy given by the Codicil and also to the Legacy of 3,000 *l.* given by the Will.

Mr. *Treslove* and Mr. *Wray* for the Plaintiffs.

Mr. *Knight*, Mr. *Rogers* and Mr. *Kerby* for the Defendants.

1834:
5th July.

MILLS v. OSBORNE.

Trustee.

Testator directed his Trustees, at the expiration of three years after his death, to pay 10,000*l.* (which he charged on an Estate devised to his Son, one of the Trustees) to his Daughter's Husband, on condition that he should, to the satisfaction of the Trustees, give to them the best and most sufficient security in his power, so that the 10,000*l.* might be effectually secured to them upon certain Trusts for the Testator's Daughter and her Children. The Son paid the Money to the Husband, before the expiration of the three years, and the Trustees took a Bond for securing it. Held they were justified in anticipating the time of payment, but not in taking the Bond.

THIS was a Suit, by the Vendor against the Purchaser of an Estate, for a Specific Performance of the Contract. The Purchaser objected to complete his Purchase on the ground that the Estate was not effectually discharged from a sum of 10,000*l.* with which it had been charged by the Will of *John Bawtree*, a Brewer at Colchester and who was a former Owner of the Estate. The Objection was founded on the following facts :

The Testator, by his Will dated the 13th of July 1822, devised the Estate in question, with others, and also, his General Personal Estate, to his son, *John Bawtree*, his Heirs, Executors &c. charged with the payment of 10,000*l.* to his, the Testator's, Daughter, *Jane*, the Wife of *Thomas Joseph Turner*, at the time and upon the conditions after-mentioned: And the Testator directed that the 10,000*l.* should continue and be employed in his Trade, and should not be drawn therefrom until the expiration of three years from the 5th of July next after his death, and, *at the expiration of such three years, that the 10,000 l. should be paid or secured to his Daughter and her Husband, but upon the conditions after-mentioned:* And the Testator further directed that his Son, his Heirs, Executors or Administrators, should pay to his Daughter, and, in case of her death, to *Thomas Joseph Turner*, her Husband, Interest

on the 10,000 *l.* at 5 *l.* per cent. per annum, until the 10,000 *l.* should be fully paid and satisfied, and that such Interest should commence from the Quarter-day next after his death ; and he expressly directed that, when the 10,000 *l.* should be paid to his Daughter, or to her Husband in case of her death, then that her Husband should, to the satisfaction of his Son, *John Bawtree*, his Brother, *Samuel Bawtree*, and his friend, *Mathews Corsellis*, (three of his Executors thereafter named and Trustees for that particular purpose,) well and effectually give and execute, to them, *the best and most sufficient Security in his power*, so as that the 10,000 *l.* might be properly and effectually secured to them or the Survivor of them, upon the following Trusts, that is to say, that his Daughter should receive the Interest thereof for her life, and, after her decease, that her Husband should receive the Interest thereof during his life, and, after his decease, that the 10,000 *l.* should be equally divided amongst all the Children of his Daughter, by her then present or any future Husband, at their respective ages of 21, and that the Interest of the Children's Shares should be applied for their Maintenance during their Minorities, but if his Daughter should have no Child who should attain 21 or die under that age leaving Issue, then that the 10,000 *l.* should go to his Son, *John Bawtree*, but in case he should be then dead, then that it should be divided amongst his Son's legal Personal Representatives in a due course of administration.

1836.
MILLS
v.
OSBORNE.

The Testator died on the 13th of October 1824, and, after his death, his Business was carried on by his Son. In April 1826, the Son, being about to retire from the Brewery, and not wishing to continue the 10,000 *l.* in

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MILLS

v.

OSBORNE.

the Business, at *Turner's* request, and with the approbation of *Samuel Bawtree* and *Corsellis*, paid to *Turner* 4,000 *l.*, in part of the 10,000 *l.*, and executed to him a Mortgage of a Real Estate for securing to him the remaining 6,000 *l.*

At the time when the above transaction took place, *Turner* was a Partner in a Bank at *Colchester*, and the Trustees at first proposed that he should give a Bond, with a Warrant of Attorney for that Sum; but as, by the Articles of Co-Partnership between him and his Partners, it was provided that it should be lawful for the Partners to dissolve the Partnership as to any Partner who should make any Mortgage, Pledge, Sale, Assignment or other Disposition of his Share of the Partnership Stock and Effects, or who should become Bankrupt or Insolvent, or should permit any part of the Partnership Property to be taken in execution for his separate Debt, the Trustees consented to take *Turner's* Bond only as a security for the 10,000 *l.*; and, there-upon, *Turner* executed to *John Bawtree*, *Samuel Bawtree* and *Corsellis* a Bond dated the 4th of April 1826, in the penalty of 20,000 *l.*; and, after reciting the Testator's Will and his death, and that *John Bawtree* being willing and desirous, notwithstanding that the time limited by the Will for the Payment of the 10,000 *l.* had not expired, to pay off and discharge or otherwise satisfy and secure the same to *Turner* and Wife, had accordingly paid and discharged or otherwise well and sufficiently secured the same to them (as *Turner* did thereby admit), and further reciting that *Turner*, being willing and desirous to comply with the condition or desire expressed in the Will, had agreed to enter into the before-mentioned Bond, being the best

and most sufficient Security in his power, for the purpose of securing to the Obligees the payment of the 10,000 *l.* with Interest, at the time and in the manner after-mentioned: The condition of the Bond was expressed to be that if *Turner*, his Heirs, Executors, &c., should pay to the Obligees the 10,000 *l.* with Interest at 5 per Cent. per Annum, on the 4th of April 1827, then the Bond should be void: And the Obligees declared that they would stand possessed of the 10,000 *l.* and of the Bond and Securities upon which that Sum should be, from time to time, invested, on the Trusts thereof declared by the Will. By an Indenture of the same date, *Turner* and his Wife, in consideration of the 10,000 *l.* therein mentioned to be paid to them by *John Bawtree*, released him and his Estate from that Sum.

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MILLS
v.
OSBORNE.

On the 10th of October 1827 *John Bawtree* paid the 6,000 *l.* to *Turner*; and, thereupon, *Turner* reconveyed to him the Premises upon which that Sum had been secured. Before the expiration of the three years from the 5th of July next after the Testator's death, *John Bawtree* had retired from the Brewery; but *Turner* continued to be a Partner in the Bank: and, before the expiration of the three years (but it did not precisely appear when) he purchased an Estate at *Shimpling* in *Norfolk*, for 3,150 *l.*, 2,400 *l.* of which was lent to him by the Trustees of his Marriage-Settlement and was secured by a deposit of the Title-deeds of the Estate. But, at the expiration of the three years, he was not seised or possessed of any other Freehold, Leasehold or Copyhold Estate, except his share of certain Estates belonging to himself and his Co-partners and which he was prevented by the Articles of Partnership from Mortgaging. The 10,000 *l.* still remained secured by the Bond.

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MILLS

v.

OSBORNE.

It having been referred to the *Master* to inquire whether the Plaintiff could make a good Title to the Estate contracted to be sold, the following Objections were carried in by the Defendant :

First : That the 10,000 *l.* was paid before the expiration of three years from the 5th of July next after the Testator's death.

Secondly : That, supposing the payment to have been properly made in point of time, it had not been shewn that the Bond was the best Security which it was in *Turner's* power to give. For if it was in his power to give Personal Security only, a Bond with a Warrant of Attorney and a Judgment entered up thereupon, would have been a better Security than a mere Bond. But it was submitted that the best Security to be obtained from *Turner*, under the circumstances of the case, was that which he was enabled to give at the time when, according to the provisions of the Will, he was entitled to receive the Legacy, that is to say, the expiration of the three years.

The Answers carried in to these Objections by the Plaintiff, were,

First: That the provision in the Will by which *John Bawtree*, the Son, was allowed to employ the 10,000 *l.* in his trade until the expiration of the three years, was intended for his benefit merely, and to prevent his being suddenly called upon to take such a sum out of his business, and that he was not precluded from paying it at an earlier time.

Secondly: That the Bond was a good performance of the Condition contained in the Will, being such Security as then appeared to the Trustees to be the best and most sufficient which it was in *Turner's* power to give; and that it was a sufficient Security without a Warrant of Attorney, which *Turner*, consistently with his Articles of Partnership, could not have consented to give, and that he was not, at the expiration of the three years, in a condition to give any better or more sufficient Security.

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v.
OSBORNE.

The *Master* reported against the Title: upon which the Plaintiff excepted to his Report.

Sir *E. Sugden* and Mr. *E. Montagu*, in support of the Exception:

The Testator's Son was at liberty, if he thought fit, to pay the 10,000 *l.* before the expiration of the three years, as it was for his benefit merely that the payment was postponed. The Trustees were made the Judges as to what was the best Security that *Turner* could give; and, as he had no Real Estate, and was prevented, by his Partnership Articles, from giving a Warrant of Attorney, the Trustees were justified in taking the Bond, which was, in fact, the best Security he could give. If the Testator had intended that the Legacy should be perfectly secured, he had it in his power to effect that object, for he might have settled the Legacy.

Mr. *Preston* and Mr. *Jacob* in support of the Report:

This is a case between Vendor and Purchaser; and the Purchaser cannot be protected, by a Decree in this Cause, from the Claims which Mrs. *Turner* and her Children may make. The Plaintiff ought to have brought forward Mr. *Turner*, in order to shew that the

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 ————
 MILLS.
 v.
 OSBORNE.

Bond was the best Security he could give; but Mr. *Turner* has not ventured to pledge himself that it was the best Security. He would be the first person to give information in a Suit instituted by his Wife and Children.

The 10,000*l.* was to be paid at the time and upon the Conditions mentioned in the Will. The Trustees, therefore, acted irregularly in paying the Money and taking the Security before the end of the three years. Their discretion, whatever it was, was to be exercised at the end of the three years and not before. Before the expiration of that time, and, perhaps, even before the Money was paid, Mr. *Turner* acquired Property which he might have made a Security for the Legacy. The Legacy, when paid, was to be secured on the best and most sufficient Security, as well as to the satisfaction of the Trustees. In *Wilkes v. Steward* (a) Executors were empowered to lay out a Legacy in the Funds, or on such other good Security as they could procure and should think safe: and Sir *W. Grant*, M. R. was clearly of opinion that the Executors had no power to lay out the money on personal Security; but that it was like Trustees to sell, who could not be justified in selling for any other price than the best that could be obtained. So, in this Case, the Trustees were not to judge, arbitrarily, what was the best and most sufficient security, but were bound to take the best that could be obtained.

Another question is whether the Testator, by the word *Security*, could have meant a mere Bond, which is, in fact, no security, but only evidence of a Debt. *Ryder v. Bickerton* (b). *Turner* was a Trader, and, therefore, a

(a) Coop. C. C. 6.

(b) 3 Swans. 80, note. S. C. 1 Eden, 149, note.

Bond was not materially better than a Promissory Note. If the Testator had intended that the Trustees should rely on *Turner's* Bond, it would have been easy for him to have expressed it. The Trustees did ask him for a Warrant of Attorney; so that they did not think, at first, that a Bond was the best Security. The objection to giving a Warrant of Attorney would have equally applied to a Bond. Besides the Partnership Assets could not have been taken in execution, as a Banker's Property consists of Choses in Action and Money. [The *Vice-Chancellor*:—*Turner* was not debarred, by his Partnership Articles, from giving a Warrant of Attorney. It was only in case it produced a certain effect, that his Copartners were empowered to determine the Partnership.]—It is clear that *Turner* was entitled to Property under his Marriage-Settlement, for it is stated, in the Affidavits made in support of the Plaintiff's State of Facts, that he borrowed 2,400 *l.* of the Trustees of his Settlement: the Trustees, therefore, might have taken a Security on his interest under the Settlement; or they might have taken a Second Mortgage on the Estate which he purchased in *Norfolk*, which would have been somewhat better than the Bond: or they might have required him to insure his Life and pledge the Policy, or to give a Bill of Sale of his Furniture, or to get some person to join him as a Surety in the Bond. It is not to be supposed that he spent the whole of the 10,000 *l.*: it is most probable that he invested it either in a Purchase or on some Security; so that he might have given a Security on the Purchase or Investment.

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v.
OSBORNE.

THE VICE-CHANCELLOR:

I do not think that anything turns on the Legacy having been paid before the time pointed out by the

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Testator; for the extended time was given for the benefit of the Son, and not for the benefit of the Daughter or her Children; and, therefore, it was competent to the Son to make the payment at any time he thought fit within the three years, provided proper Security was taken. No payment, however, which would discharge the Estate, could be made, except upon the condition which the Testator has expressed, namely, that the best and most sufficient Security which it was in *Turner's* power to give, should be taken, so as that the Legacy might be properly and effectually secured to the Trustees upon the Trusts declared by the Will. But, in any way of viewing this Case, I do not think that the Trustees did take the best and most sufficient Security which it was in *Turner's* power to give. The Bond is not the best form of Bond that might have been taken, nor, indeed, is it in the common form; for the Money is not made payable until a year after the date; whereas it might have been beneficial to have made it payable on the next day. The Affidavits too which have been made in support of the Plaintiff's State of Facts, are not satisfactory as to the state of *Turner's* Property at the time when the Security was given. They allege merely that, to the best of the knowledge information and belief of the Deponents, *Turner* was not, *at the expiration of the term of three years*, possessed of any Freehold, Copyhold or Leasehold Estate, except his Share of the Estates belonging to himself and his Copartners, and also except a certain Estate at *Stimping* in *Norfolk*, which had then been purchased by him. And *Mason*, one of the Deponents, who was the Testator's Solicitor, says that the Testator, at the time of making his Will, was well aware that *Turner* was not possessed of any Property upon which he could

give any Security for the 10,000*l.*; and that the Testator then distinctly expressed himself to the Deponent, that he did not consider that *Turner* would be able to give any other or better Security than his Bond, for the 10,000*l.* (c). It was, however, not improbable that *Turner's* circumstances might improve between the date of the Will, and the time pointed out, by the Testator, for paying the Legacy; and, therefore, I cannot suppose that the Direction in the Will as to the Security to be given by *Turner*, was inserted with a view to the state of his Circumstances at the date of the Will.

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MILLS
v.
OSBORNE.

It appears, however, by the Affidavits, that the Trustees might have obtained a better Security than the Bond: for they might have taken a Security either on *Turner's* interest under his Marriage-Settlement, or they might have made him insure his Life and assign the Policy, or they might, for any thing that appears to the contrary, have taken a Security on the *Shimpling* Estate: Therefore, I am of opinion, from what appears on the face of the Evidence, that the Security taken was not the best Security or such as the Trustees ought to have been satisfied with; and I am confirmed in that opinion by the circumstance that the Plaintiff has not procured any Affidavit to be made by Mr. *Turner* in support of his Case.

Exception overruled.

(c) In the argument of the Case, the Defendant's Counsel objected to this part of the Affidavit being read, on the ground that it was not Evidence.

1834:
5th July.

Will.
Construction.

Testatrix bequeathed as follows: "I give the Legacy of 4,000 *l.* to *A.*, and, in case of his decease, I give the same Legacy to his Wife, and, at her decease to their eldest Daughter:" Held that *A.*, having survived the Testatrix, was absolutely entitled to the Legacy.

CRIGAN *v.* BAINES.

MARY BAINES made her Will dated the 2d of December 1831, in the following words: "I direct that all my Debts Funeral and Testamentary Expenses shall be paid by and out of my Personal Estate. I give and bequeath to my Niece, *Mary Catherine Baines*, the Legacy or Sum of 500 *l.* I give and bequeath to my Cousin, *Eliza Lucy Russell*, the Legacy or Sum of 1,000 *l.* I give and bequeath to my God-Daughter, *Jane Ashwith*, the Legacy or Sum of 1,000 *l.*, to be paid free of Legacy Duty, and, immediately on my decease, placed out at Interest for her on good Security. I give and bequeath the Legacy or Sum of 4,000 *l.* to my Friend and Pastor, The Rev. Dr. *Alexander Crigan*, Rector of *Escrick* in the County of *York*, and, in case of his decease, I give and bequeath the same Legacy or Sum to his Wife, *Mary Crigan*, and, at her decease, to their eldest Daughter, *Mary Smelt Crigan*. I give and bequeath to my faithful Maid, *Elizabeth Flint*, the Legacy or Sum of 200 *l.* I give and bequeath the Legacy or Sum of 10 *l.* annually, for life, to *John Wiley*, for teaching the *Deighton* Sunday School. I give and bequeath all my Personal Estate and Effects whatsoever and wheresoever, subject as aforesaid, unto and to the use of my dear Brother, *Hewley Mortimer Baines*, of *Bell Hall* in the County of *York*, Esq., his Heirs, Executors, Administrators and Assigns, and I appoint him sole Executor of this my last Will and Testament."

The Testatrix died on the 24th of January 1834.

The Bill was filed by Dr. *Crigan*, praying that he, having survived the Testatrix, might be declared to be solely and absolutely entitled to the Legacy of 4,000 l.

1834.

CRIGAN
v.
BAINES.

The Defendants, Mrs. *Crigan* and her Daughter, submitted that, according to the true construction of the Will, the Plaintiff was entitled to the Legacy for his life only, and that, if Mrs. *Crigan* survived the Plaintiff, she would be entitled to the Legacy for her life, and that, after the death of the Survivor of them, *Mary Smelt Crigan*, would be absolutely entitled to the Legacy.

Mr. *Knight* and Mr. *Girdlestone*, jun., for the Plaintiff.

Mr. *Bagshawe* for the Defendants, Mrs. and Miss *Crigan*, cited *Billings v. Sandom* (a), *Cambridge v. Rous* (b), *Galland v. Leonard* (c), *Montagu v. Nuccella* (d).

Mr. *Cankrien* appeared for the Defendant *Hewley Mortimer Baines*.

The Vice-Chancellor held that the Plaintiff, having survived the Testatrix, was absolutely entitled to the Legacy, and directed the Costs of all Parties to be paid out of the Testatrix's Residuary Estate.

(a) 1 Bro. C. C. 393.

(c) 1 Swanst. 161.

(b) 8 Ves. 12.

(d) 1 Russ. 165.

1834:
8th July.

*New Orders.
Practice.
Exceptions.*

Defendant took one, general Exception to a Report finding his Examination insufficient.

The Court held the Report to be right in part and wrong in part; and overruled the Exception and gave the Plaintiff the Deposit; but under the 41st Order of 1831, refused to make any Order as to Costs.

WARD v. FITZHUGH.

THE Plaintiff took Exceptions to the Defendant's Answer and Examination to two Interrogatories, and the *Master* reported it to be insufficient as to both. The Defendant then took *one* Exception to the Report, insisting that the *Master* ought to have reported that the Answer and Examination was sufficient.

The *Vice-Chancellor* held that the Answer and Examination was sufficient as to one of the Interrogatories, but insufficient as to the other, and overruled the Exception. His *Honor*, however, under the 41st of the New Orders of 1831, refused to make any Order as to the Costs, but gave the Plaintiff the Deposit.

Sir *E. Sugden* and Mr. *Campbell* for the Plaintiff.

The *Solicitor-General* and Mr. *Wakefield* for the Defendant.

BLOUNT v. HIPKINS.

JAMES HIPKINS, by his Will dated the 6th of February 1831, devised as follows: "I give and bequeath unto my dear Wife, *Mary Hipkins*, all my Household Goods and Furniture, Plate, Linen, China, Pictures, Wines, Farming Stock, Ready Money, Debts, Personal Estate and Effects of every kind and denomination, and which I shall happen to die possessed of or entitled unto, except my Gold Watch, Riding Horse, best Saddle and Bridle, Clothes and Wearing Apparel, and 10 Shares in the *Stratford Canal Navigation*: To hold the same and every part thereof (except as aforesaid) unto her my said Wife, to and for her own absolute use and benefit: also I give and devise unto my said Wife, all that my Messuage, Tenement or Dwelling-house, with the Outbuildings, Gardens and the several Closes, Pieces or Parcels of Land Meadow or Pasture Ground to the same belonging, and now in my own possession, and also all those two Closes or Pieces of Land situate lying and being behind the said Messuage and Premises and purchased by me of and from *Lillingstone Spooner, Esq.*, Trustee of *Aston Park Estate*, and *John Benson*, and also the benefit of any Contract for the purchase of any part of Property agreed to be purchased by me from the said *John Benson*, and which, at the time of my decease, may not have been carried

1834:
8th July.

Will.
Construction.
Exoneration.

Testator gave to his Wife, certain Articles of his Personal Estate, which he mentioned specifically, and also certain portions of his Real Estates free from the Mortgages thereon, and the benefit of certain Contracts which he had entered into for the purchase of other Real Estates. And he devised the rest of his Real Estates to *A. B.*, in Trust to sell, and, out of the Proceeds, to pay, in the first place, his Funeral and Testamentary Expenses, his

Debts due on the Mortgages of the Estates devised to his Wife, the Sums due on the Contracts and all his other Debts, and, in the next place, he directed certain Sums to be paid, out of the Proceeds, to different Persons, and gave the Residue to *C. D.* and appointed his Wife sole Executrix. Held that the Personal Estate was exonerated from the Debts.

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into effect: To hold the said Messuage, Tenement, Dwelling-house and Outbuildings, Lands, Hereditaments and Premises unto her my said Wife, her Heirs and Assigns for ever, freed and discharged of and from any Mortgage or Mortgages now affecting all or any part of the same Premises. Provided always, and I do hereby declare it to be my Will and meaning that the Devise hereinbefore made to my said Wife, shall be taken and considered to be in lieu, full payment, satisfaction and discharge of all Sum and Sums of Money advanced to me by her, my said Wife, since our intermarriage, or by her Trustees named in the Settlement made and executed previous to our intermarriage, and for which I have given or entered into any Bonds or Notes or other Securities, and which Bonds or Notes or other Securities I hereby direct shall be delivered up unto my Trustee, *John Blount* the Younger, within six months after my decease, in order that the same may be cancelled; and in case my said Wife or her Trustees, shall refuse to give up such Bonds or Notes or other Securities, then I do hereby declare that the Devise to my said Wife hereinbefore contained, shall become void: also I give and bequeath unto my illegitimate Son, *James Grove*, my Gold Watch, Clothes and Wearing Apparel, my Riding Horse, with my best Saddle and Bridle, to and for his own use and benefit: also I give and bequeath unto my Niece, *Ann Hodgkins*, all those my 10 Shares in the *Stratford Canal Navigation*, to and for her own absolute use and benefit: I give and bequeath unto my Friend, the said *John Blount* the Younger, all and every the Messuages, Lands, Tenements, Hereditaments and all other the Real Estates whatsoever of or to which I, or any other Person or Persons in Trust for me, is or are seised or

entitled for an Estate of Freehold and Inheritance or of Freehold only, or which are of the nature of Copyhold or Customary Tenure, situate and being in the County of *Warwick* or elsewhere in *England*, and whether in Possession, Reversion, Remainder or Expectancy, or of which I have a power to dispose or to appoint by this my Will, with their and every of their Rights, Members and Appurtenants (except such Estates as I have hereinbefore devised to my Wife) to hold the same and every part thereof (except as aforesaid) unto and to the use of the said *John Blount*, his Heirs and Assigns, according to the nature and quality thereof respectively, upon Trust that he, the said *John Blount*, his Heirs or Assigns do and shall, as he or they in his or their discretion shall think proper, absolutely sell and dispose of my said Messuages, Lands, Tenements, Hereditaments and Real Estates: And I do hereby declare and direct that the said *John Blount*, his Executors, Administrators and Assigns do and shall stand and be possessed of and interested in all the Money to arise from the sale or sales of my said Real Estates, and of and in the Rents, Issues and Profits thereof until the same shall be so sold and disposed of, upon Trust that he, the said *John Blount*, his Executors, Administrators and Assigns do and shall, thereout, in the first place, pay, satisfy and discharge my Funeral Expenses, the Costs, Charges and Expenses of proving this my Will, and all Debts due from me upon Mortgage of the said Messuage, Buildings, Lands and Hereditaments so devised to my said Wife as hereinbefore mentioned, and also any sums of Money due and owing from me for the Purchase of any part of the said Messuage, Lands and Premises so devised unto my said

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Wife, if any shall appear to be due upon account thereof, and all other just Debts that shall be due and owing from me at the time of my decease, and do and shall also retain and pay unto and for himself and themselves, the Costs and Charges of assigning such Mortgage or Mortgages to my said Wife, or to such other Person or Persons as she shall direct or appoint, or otherwise releasing or re-conveying the said Messuage, Outbuildings, Lands and Hereditaments, so devised to her as aforesaid, from the said Mortgage or Mortgages, and also all such Costs, Charges and Expenses as he or they shall be at or be put unto in effecting such Sale or Sales and in carrying into execution the Trusts of this my Will, and also do and shall retain unto himself the Sum of 50 *l.* as a mark of my esteem and friendship: and upon further Trust that he, the said *John Blount*, his Executors, Administrators or Assigns shall and do, by and out of the Money to arise from such Sale or Sales, in the next place, pay unto my Nieces, *Amelia* and *Eliza Hipkins*, the Sum of 1,000 *l.* each, with Interest for the same after the rate of 4 *l.* per cent. per annum, to be calculated from the day of my decease, by Half-yearly Payments, until my said Real Estates shall be so sold and disposed of and the said Legacies shall be paid; and upon further Trust that he, the said *John Blount*, his Executors, Administrators or Assigns shall and do, by and out of the Money to arise from such Sale or Sales, lay out and invest the Sum of 1,000 *l.* in his or their Name or Names, in the Parliamentary Stocks or Funds of *Great Britain*, or at Interest on Government or Real Securities: And I direct that the said *John Blount*, his Executors and Administrators shall stand possessed of and interested in the said Sum of 1,000 *l.*

and the Stocks, Funds and Securities in which the same shall be invested, upon Trust to pay the Interest, Dividends and Annual Proceeds thereof unto my Niece, the said *Ann Hodgkins*, to and for the benefit of herself and her Sister, *Sarah Hodgkins*, for and during the term of their natural lives and the life of the Survivor of them."

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The Testator then gave several other Legacies out of the Monies to arise from the Sale of his Real Estates, and directed *J. Blount* to pay the Residue of those Monies, after the several thereinbefore mentioned Payments and Deductions thereout, to *James Grove*, his Executors and Administrators, and appointed his Wife sole Executrix of his Will.

The Testator made a Codicil dated the 4th of May 1831, in the following words: "Whereas, in and by my Will bearing date the 6th day of February now last past, I have bequeathed to my dear Wife, *Mary Hipkins*, for her own absolute use and benefit, all my Personal Estate and Effects, except my 10 Shares in the *Stratford Canal Navigation*, which I have bequeathed to my Niece, *Ann Hodgkins*, and, also, except my Gold Watch, Clothes and Wearing Apparel, Riding Horse and best Saddle and Bridle, which I have bequeathed to my illegitimate Son, *James Grove*: Now I do hereby direct that the said *James Grove* shall have all my Saddles and Bridles, and all other Furniture belonging or appertaining to my said Horse, for his own use, and I do hereby give and bequeath the same to him accordingly: and I do hereby revoke the said Bequest to my said Wife so far as relates to my Encyclopedia, and do give and bequeath the same to my

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said Wife, for her life only, and, from and immediately after her decease, I give and bequeath the same to *James Grove*, for his own Use and Benefit: And whereas I have, in and by my said Will, devised a certain Messuage and Premises now in my possession and two Closes of Land behind the same, to my said dear Wife, her Heirs and Assigns for ever, and all the Rest and Residue of my Real Estate whatsoever, I have devised to my Friend, *John Blount*, his Heirs and Assigns, upon Trust to sell in manner therein mentioned: Now I do hereby revoke the said Devise to the said *John Blount*, so far as relates to all that Messuage or Tenement, Garden and Premises situate lying and being in the Parish of *Aston* in the said County of *Warwick*, and now in the possession of *Benjamin Twist*, and also all that Croft or Close of Land adjoining to the said Messuage and Premises, now in the possession of the said *B. Twist* and *Edward Briggs*; and I do hereby give and devise the said Messuage or Tenement, Garden, Croft and Premises last mentioned, unto my said dear Wife, to hold to her, her Heirs and Assigns for ever, freed and discharged of and from any Mortgage or Mortgages now affecting all or any part of the same Premises: And I do confirm the said Devise, so made to the said *John Blount*, his Heirs and Assigns, of the Residue and Remainder of my said Real Estate in all other respects; and I do hereby declare my Will and meaning further to be that the said *John Blount*, his Executors, Administrators, or Assigns shall and do, by and out of the Money to arise from the sale of my said Estate devised to him as aforesaid, lay out and invest the further Sum of 1,000 *l.*, in his or their Name or Names, in the Parliamentary Stocks or Funds of *Great Britain* or at Interest upon Govern-

ment or Real Securities, and pay and apply the Dividends or Interest therefrom arising, unto or for the Use of my Nieces, *Ann Hodgkins* and *Sarah Hodgkins*, for and during the term of their natural lives and the life of the Survivor of them, in the same manner as is directed in and by my said Will in respect of the Sum of 1,000 *l.* therein mentioned; and, from and after the decease of the Survivor of them, the said *Ann Hodgkins* and *Sarah Hodgkins*, upon Trust that he the said *John Blount*, his Executors, Administrators or Assigns, shall and do call in the said Sum of 1,000 *l.*, and pay the same, together with all Dividends or Interest that shall become due thereon after the decease of such Survivor, unto my two Nieces *Amelia* and *Eliza Hipkins*, named in my said Will, their Executors or Administrators, to be equally divided between them, share and share alike; and I direct that the Residue of the Money to arise from such Sale or Sales, after payment of the said Sum of 1,000 *l.* hereinbefore mentioned and the several Sums mentioned in my said Will, shall be paid to the said *James Grove*, his Executors, Administrators or Assigns in the manner directed by my said Will."

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The Testator died on the 14th of May 1831. After his death the Bonds and other Securities mentioned in the Will to have been executed by him, were delivered up as directed by the Will.

The Bill was filed, by *J. Blount*, to have the Will established and the Trusts performed. The Question at the hearing of the Cause, was whether the Proceeds of the Real Estates directed to be sold, were not applicable, in the first place, to the payment of

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the Testator's Debts, in exoneration of his Personal Estate.

Sir *E. Sugden* and Mr. *William Lowndes* for the Plaintiff.

Mr. *Knight* and Sir *George Grey* for the Defendant, the Testator's Widow, cited *Burton v. Knowlton* (a), *Hancox v. Abbey* (b), *Bootle v. Blundell* (c), *Greene v. Greene* (d), *Driver v. Ferrand* (e).

Mr. *Rolfe* and Mr. *Armstrong* for the Defendant *James Grove*.

Mr. *G. Richards* and Mr. *Chichester* for the other Legatees.

Mr. *Wilcock* for the Heir.

THE VICE-CHANCELLOR:

The Testator gives to his Wife, not his Personal Estate, generally, but a great variety of Articles which he specifically enumerates; he also gives to her a portion of his Real Estates, freed and discharged from any Mortgages affecting the same, and he directs that she shall have the benefit of certain Contracts which he had entered into for the purchase of other Real Estates. He then gives all his Real Estates, except those which he had devised to his Wife, to the Plaintiff, in Trust to sell, and, out of the proceeds to pay, in the first place, his Funeral and Testamentary Expenses, his Debts due

(a) 3 Ves. 107.

(b) 11 Ves 179.

(c) 1 Mer. 193.

(d) 4 Madd. 148.

(e) 1 Russ & Myl. 681.

on Mortgage of the Estates devised to his Wife, the Sums due on the Contracts the benefit of which he had given to his Wife, and all other Debts that might be due from him at his death and the Costs of assigning the Mortgages and of carrying into execution the Trusts of his Will. The Testator, therefore, must, necessarily, have had his Personal Estate in his contemplation, and must have intended that his Widow should take his Personal Estate exonerated from his Debts.

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Declare that the Real Estates devised to the Plaintiff, are the Primary Fund for payment of the Testator's Debts.

At the time when the *London and Birmingham Railroad* was projected, the Testator subscribed for 20 Shares, of 100*l.* each, in the Undertaking, and paid 5*l.* on each Share; and he executed a Deed of Covenant for payment of the remainder, within 10 years from the date of the Deed. At the time of his death the Shares were at a premium of 4*l.* each; but he had not been called upon to make any further payment on his Shares. The Act of Parliament for making the Railroad, (3 & 4 Will. 4, chap. 36) was not passed

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21st November
&
5th December.

Debt.
Railroad
Shares.

and paid 5*l.* on each Share, and covenanted to pay the remainder when called on. He bequeathed his Personal Estate to his Widow, and devised certain of his Real Estates to a Trustee, in Trust to sell and pay all Debts due from him on Mortgage, or for the Purchase of Estates which he had contracted for, and all other just Debts that should be due from him at his death. When he died the Shares were at a premium, and no further Instalment on them had been called for. Two years afterwards, the Act for making the Railroad, passed. Held that the Testator's Personal Estate, being exonerated from his Debts, his Widow was entitled to have the unpaid Instalments paid out of the Real Estates.

Testator sub-
scribed for 20
Shares of 100*l.*
each, in a pro-
jected Railroad,

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until the 6th of May 1833 (a), which was nearly two years after the Testator's death.

The question which now came on to be argued, and which had been reserved at the hearing of the Cause, was whether the Instalments on the Shares, remaining unpaid at the Testator's death, were to be considered as Debts which, under his Will, were to be paid out of the proceeds of his Real Estates directed to be sold, or whether the Shares passed to his Widow, subject to the payment of those Instalments.

Mr. *Knight* and Mr. *Blunt*, for the Testator's Widow, said that the Obligation to pay the Instalments on the Shares, was contracted by the Testator: that, on his death, his Personal Estate was fixed with the Liability; but, by the Will, it was to be exonerated out of the proceeds of the Real Estates: that, at the Testator's death, his Widow was entitled to have the Shares free of charge, and that her Rights, as they stood at the Testator's death, could not be affected by the Act of Parliament.

The *Solicitor-General* (b) and Mr. *Armstrong*, for the Defendant *James Grove*:

The Money remaining due for the Shares, was not a Debt within the meaning of the charge created by the Will. Nothing was due from the Testator at his death. No call had been made upon him; and it was uncertain whether any call would be made. The unpaid Instalments, therefore, were not a Debt due from the

(a) The Sections of the Act, which were referred to in the Argument, are stated in the Judgment.

(b) Mr. Rolfe.

Testator ; they could not have been recovered otherwise than as Damages for the non-performance of the Covenant.

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When a Testator bequeaths Railroad Shares to a Legatee, he considers that he is giving something valuable. In this Case the Shares were of value, for, at the Testator's death, they were at a premium of 4*l.* per Share. The Legatee, therefore, must take them *cum onere*.

The Act did not pass until two years after the Testator's death, and then all liability under the Deed of Covenant, ceased. *The Huddersfield Canal Company v. Buckley (c)*.

The *Vice-Chancellor*, after stating the substance of the Will and Codicil, proceeded thus :

The Testator, when The *London and Birmingham Railway* was projected, subscribed for 20 Shares in the Undertaking, and paid a Deposit of 5*l.* on each Share, and signed a Contract and executed a Deed bearing date the 15th of October 1830. The Deed and Contract were prepared pursuant to Standing Orders of both Houses of Parliament. By that Deed, the Testator, for himself, his Heirs, Executors and Administrators, covenanted with Persons named, that he, his Heirs, Executors, Administrators or Assigns would pay the Amount subscribed by him, which was 2,000*l.*, within 10 Years from the Date of the Deed, in such Sums and at such Places and Times as, until the passing of the intended Act of Parliament, should be required by the Directors for the time being engaged

(c) 7 T. R. 36.

E 3

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in the Undertaking, and, after the passing of the Act, as the Directors or others authorized by the Act, should appoint or direct.

On the 14th of May 1831 the Testator died. No Call was made, before his death, for payment on any of his Shares, except the Deposit.

On the 6th of May 1833, the Act for making the Railway, passed. By the first Section, certain Persons named and all other Persons who had subscribed or should thereafter subscribe towards the Undertaking, and their several Executors, Administrators and Assigns were united into a Company, and made one Body Corporate, by the name of *The London and Birmingham Railway Company*. By the 3d Section, the Company were authorized to raise 2,500,000 *l.* in 25,000 Shares of 100 *l.* each. By the 151st Section, Directors were appointed. Then follow several Regulations for the payment of Subscriptions. The 161st Section seems not applicable to the present Case; for it only speaks of the Parties who have subscribed or who shall hereafter subscribe, and says they are hereby required to pay the Sums by them respectively subscribed. The Executrix of a Person who had subscribed and died before the passing of the Act, is not within those words. The 162d Section uses more extensive language, and enables the Directors to make Calls of Money from the Subscribers to and Proprietors of the Undertaking, and directs that the Owners of Shares shall pay, and that, if any Owner shall not pay, it shall be lawful for the Company to recover by Action of Debt or on the Case, or to declare the Shares of the Person so refusing to be forfeited, and to sell

them. The 164th Section enacts that, in any such Action, it shall be sufficient to declare that the Defendant, being a Proprietor, is indebted, and that, on the Trial, it shall only be necessary to prove that the Defendant was, at the time of making such Calls, a Proprietor. The 166th Section makes the Shares Personal Estate; and though, by the 167th Section, power is given to the Proprietors to sell their Shares, yet, by the 168th Section, no person shall sell any Share, after any Call has been made by the Directors for any Sum in respect of such Share, unless he, at the time of such Sale, shall have paid the full Sum which shall have been called for. But I see nothing in the Act of Parliament which destroys the right that the Directors had to sue, in the Names of their Trustees, upon the Indenture of the 15th of October 1830.

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After the Act was passed, three Calls were made, and the question before me is whether Mrs. *Hipkins* is not entitled to have the Amount of those Calls, as, also, of all future Calls raised out of the residuary Real Estate of her Husband.

It appears to me that the Covenant in the Indenture of the 15th of October 1830, constituted a Debt within the meaning of the Testator's Will, though payable *in futuro*, and, to a certain extent, contingent, but no otherwise contingent than as the Shares given to Mrs. *Hipkins* were, themselves, contingent upon the proceeding of the Undertaking and the passing of the Act. He meant, I think, to give her, as a Purchaser for Valuable Consideration, his general Personal Estate free from any Obligation which affected him to pay Money in respect of it, in the same manner as he de-

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vised to her Estates liable to Mortgages, and Estates agreed to be bought and not paid for. And, if the Act of Parliament has destroyed the Covenant, yet the liability of the Executrix and Legatee as Owner under the Act, would only be a substitution at Law for the Covenant, and her Equity would remain the same: and I am of opinion that the Amount of the past as well as of future Calls, must be raised out of the Residuary Real Estate.

LUNN v. OSBORNE.

PRUEN v. OSBORNE.

1834:

8th & 9th July.

*Will.
Construction.*

Testator devised his Real Estates to the Children of his Sister then or thereafter to be born, who should live to attain 21, and the Issue of such of them as should die under that age leaving Issue living at their decease, and their Heirs: and if no child of his Sister should attain 21, *or dying without leaving Issue* or, dying under that age should not leave such Issue, or such Issue dying under age as aforesaid, then over. The Testator's Sister had one Child, who attained 21 and afterwards died without Issue. Held that the Child took an absolute Estate in Fee on attaining 21.

JOHN WILCOX, by his Will dated the 28th of March 1810, gave all his Real and Personal Estate to Trustees, their Heirs, Executors, Administrators and Assigns, in Trust to apply his Personal Estate in payment of his Debts, Funeral and Testamentary Expenses and Legacies, as far as it would extend, and to raise the deficiency by Sale or Mortgage of his Real Estates, and, subject thereto, to grant Leases of his Real Estates and to pay certain Annuities out of the Rents, and then to stand seised and possessed of his Real Estates and the Surplus of his Personal Estate: "In Trust for all and every the Child and Children of my Body hereafter to be born in my lifetime or in due time after my

death, who shall live to attain the age of 21 years, and the lawful Issue of all such of the same Children as shall die under that age leaving lawful Issue living at his or their decease or respective deceases, or (as to the Issue of a deceased Son or Sons) born in due time afterwards, which Issue shall afterwards attain the age of 21 Years or die under that age leaving Issue living at his, her or their decease or deceases respectively, *and their several Heirs, Executors, Administrators and Assigns* respectively, as Tenants in common, if more than one, and such Issue to take not *per Capita* but *per Stirpes*, or the Share or Shares which his, her or their deceased Parent or Parents respectively would have taken if living: And in case there shall be no Issue of my body who shall live to attain the age of 21 years, or, dying under that age, shall not * leave such Issue as before is mentioned, then and in such case, from and after my decease and such want or failure of Issue as aforesaid, my Will and meaning is that my said Freehold and other Real Estates and the Residuary Trust Monies and Securities for the same, shall be upon Trust for all and every the Children and Child of my Sister *Sarah*, the Wife of *George Osborne*, now and hereafter to be born, who shall live to attain the age of 21 years, and the lawful Issue of all such of the same Children as shall die under that age leaving lawful Issue living at his, her or their decease or respective deceases, or, (as to the Issue of a deceased Son or Sons) born in due time afterwards, and their respective Heirs, Executors and Administrators, as Tenants in common, if more than one, and such last-mentioned Issue to take not *per Capita* but *per Stirpes*, or the Share or Shares which his, her or their deceased Parent

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* So in the Copy of the Will.

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or Parents would have taken if living ; and if there shall be no Child of the Body of my said Sister, *Sarah*, who shall live to attain the age of 21 years, *or dying without leaving Issue (a)*, or dying under that age shall not* leave such Issue, *or such Issue dying under age as aforesaid*, then and in such case, from and after my decease and such several wants or failures of Issue as are hereinbefore mentioned, my Will and meaning is that my said Freehold and other Real Estates and Premises shall be upon Trust to be by them, my said Trustees, absolutely sold." The Testator then directed that the Proceeds of the Sale, together with such part of his Residuary Personal Estate as should be then out at Interest, should be divided between the Children of the Brothers and Sisters of his late Father and Mother, and two of his Cousins whom he mentioned by name.

The Testator made a Codicil dated the 27th of April 1813, containing the following words : " If my Property falls to my Sister's Child or Children, and they die leaving no Child or Children to attain the age of 21, in that case, they shall only have their Life-interest, and, at • their decease, my Property Real and Personal shall be divided amongst my Cousins according to my Will."

The Testator died without Issue, leaving his Sister, *Sarah Osborne*, his Heir at Law. She had Issue one child only, *John Wilcox Osborne*.

By the Decree in the original Suit, the Will was established and the Trusts were ordered to be performed.

(a) These words and those that follow in Italics, were interlined in the original Will.

• So in the Copy of the Will.

John Wilcox Osborne attained 21, and suffered a Recovery of the Freehold Estates devised to him. He afterwards died without Issue; and, thereupon, the Devisees in Trust under his Will, filed a Bill of Revivor and Supplement.

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Sir *E. Sugden* Mr. *Lynch* and Mr. *Bacon*, for the Plaintiffs in the second Suit:

The question is what Estate *John Wilcox Osborne* took in the Testator's Estates under the limitations in his Will. We submit that he took an Estate in Fee, which became indefeasible on his attaining 21.

This Case is similar to *Toovey v. Bassett* (b); but this is a stronger Case; for, there, no words of limitation were added to the Devise to the Testator's Grandchildren. There is an older Case which shews that the super-added words: "or dying without leaving Issue, &c." will not cut down the Estate in Fee. *Hinde and Lyon's Case* (c). If a Testator devises to a Person in Fee, and then substitutes another Devisee who is to take on the happening of a certain event, the substituted Devisee will take a Fee, although no words of limitation are added. So, where an Estate is given to a Person, and there is a Devise over with words of limitation, those words, though not added to the first Devise, give the original Devisee an Estate in Fee. *Moone v. Heaseman* (d), *Doe v. Candall* (e), *Robinson v. Grey* (f). In this latter case it was decided that the Children of the Testator's Daughters took Estates in Fee, because there were words

(b) 10 East. 460.

(c) 3 Leon. 64.

(d) Willes, 138.

(e) 9 East. 400.

(f) Ibid. 1.

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OSBORNE.

of limitation in the Devise over. So, here, the Devise over to the Trustees in Trust to sell, gives them the Fee. In *Glover v. Monckton* (g), it was held that the Testator's Son took an Estate in Fee, although the Property was given over on his dying without Issue, and not on his dying under 21.

Secondly, we contend that the words, "or dying without leaving Issue," ought either to be rejected as repugnant to the subsequent words, or to be considered merely as expressing that which is afterwards more particularly defined. It is clear, from the context, that those words do not mean a general, but only a particular failure of Issue. If they were to be taken to mean a general failure of Issue with respect to the Real Estate, they must be considered to mean a particular failure of Issue with respect to the Personal Estate, according to the decision in *Forth v. Chapman* (h). That, however, would be inconsistent with the Devise to the Children of *Sarah Osborne*, for they were to take nothing unless they attained 21. The words that create the difficulty, do not occur in that part of the Will which contains the disposition in favour of the Testator's own Children. Those words appear, by the original Will, to be interlined in a different hand. It is a general rule, not to cut down a clear Provision, by ambiguous words creating a Gift over.

The Gifts over in the Will and in the Codicil, are, both of them, void for remoteness (i).

Should the Court hold that *John Wilcox Osborne* took an Estate-tail, then the Recovery which he suffered has destroyed the Entail.

(g) 3 Bing. 13.

(h) 1 P. W. 663.

(i) See *Leake v. Robinson*, 2 Mer. 363.

Sir *Wm. Horne*, Mr. *Knight*, Mr. *Koe*, Mr. *Hayter*, Mr. *Girdlestone*, Jun., Mr. *Sharpe* and Mr. *White* appeared for the other Parties.

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The *Vice-Chancellor* held that the words: "or dying without leaving Issue," did not cut down the Estate in Fee which *John Wilcox Osborne* took under the prior words in the Will. His *Honor* added that the words on which the question arose, were interlined in the original Will, and were, most probably, inserted by mistake.

WHEAT v. GRAHAM.

THE Plaintiffs had proved, before the Commissioners, a Document which was in the custody of the Defendants, but the Defendants refused to produce it at the hearing of the Cause, on the ground that no Order for the production of it had been obtained. They did not, however, deny that it was in their possession.

1834:

9th July.

Exhibits.
Production of
Documents.

Sir *E. Sugden* and Mr. *Koe*, for the Plaintiffs, contended that no Order was necessary, as Documents which had been proved, were in the custody and under the control of the Court, and it would be useless to prove them unless they were to be produced when the Cause was heard.

If a Plaintiff has proved a Document in a Defendant's possession, the latter must produce it at the Hearing, although he has not been served with an Order to that effect.

Mr. *Rolfe* and Mr. *Jacob*, for the Defendants.

THE VICE-CHANCELLOR :

I must take it for granted that the Document is in the possession of the Defendants, as they produced it

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before the Commissioners for proof, and they do not now deny that it is in their custody. The Defendants, by producing the Document before the Commissioners, did, in effect, undertake that it should be produced at the Hearing, as it would be useless to prove an Exhibit unless it were to be produced for discussion when the Cause is heard. The conduct of the Defendants, therefore, has created the obligation on them to produce the Document, and, unless they do produce it, the Cause must stand over.

*Evidence.
Witness.*

The Evidence of an interested Witness may be read in a Suit in Equity under 3 & 4 W. 4, c. 42, s. 26 & 27.

THE Defendants objected to the evidence of one of the Plaintiff's Witnesses, on the ground that the Witness was interested in the subject matter of the Suit.

Sir *E. Sugden* and Mr. *Koe*, for the Plaintiffs, referred to 3 & 4 W. 4, c. 42. sections 26 & 27 (a).

(a) Sect. 26: "And in order to render the rejection of Witnesses on the ground of Interest less frequent, be it further enacted, that if any Witness shall be objected to as incompetent on the ground that the Verdict or Judgment in the Action on which it shall be proposed to examine him, would be admissible in Evidence for or against him, such Witness shall nevertheless be examined, but in that case a Verdict or Judgment in that Action in favour of the Party on whose behalf he shall have been examined, shall not be admissible in Evidence for him or any one claiming under him, nor shall a Verdict or Judgment against the Party on whose behalf he shall have been examined, be admissible in Evidence against him or any one claiming under him."

Sect. 27. "And be it further enacted, that the name of every Witness objected to as incompetent on the ground that such Verdict or Judgment would be admissible in Evidence

Mr. Rolfe and Mr. Jacob, for the Defendants, said that it appeared, by the language of the Act, and, particularly, by that part of it which directed the name of the Witness to be endorsed on the Postea, that the Act was not intended to apply to Suits in Equity.

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The *Vice-Chancellor* said that, if an Act of Parliament established a new rule of Evidence, it ought to be adopted by Courts of Equity, and that he could direct the entry which the Act required, to be made in the Decree.

The Depositions of the Witness were then read.

for or against him, shall, at the trial, be indorsed on the Record or Document on which the trial shall be had, together with the name of the Party on whose behalf he was examined, by some Officer of the Court, at the request of either Party, and shall be afterwards entered on the Record of the Judgment; and such Indorsement or Entry shall be sufficient Evidence that such Witness was examined in any subsequent proceeding in which the Verdict or Judgment shall be offered in Evidence."

TIDSWELL v. BOWYER.

1834:
10th July.

*Defendant.
Supplemental
Answer.*

The Plaintiff claimed a Share of an Intestate's Estate under the Statute of Distributions. The Defendant, after filing his Answer, discovered that the Intestate was domiciled in *Java*. Leave given to file a Supplemental Answer for the purpose of stating that fact.

THE Bill was filed by the Widow of an Intestate, claiming to be entitled to a share of his Property under the Statute of Distributions. After the Answer was put in, the Defendant discovered that the Intestate was domiciled in *Java*; and he now moved for leave to file a Supplemental Answer in order to state that fact.

Sir *E. Sugden* and Mr. *Lloyd*, in support of the Motion, said that the question of Domicile was not raised by the pleadings, and, that, if it were now put in issue, it would not derogate from any admission in the Answer.

Mr. *Paynter*, for the Plaintiff, said that the Defendant, before he put in his Answer, knew that the Intestate resided and died in *Java*: that the Affidavit in support of the Motion, ought to have stated the circumstances from which it was inferred that he was domiciled there; and that the Court had great reluctance in allowing a Defendant to file a Supplemental Answer for the purpose of stating facts that might be injurious to the Plaintiff. *Wells v. Wood* (a), *Edwards v. MacLeay* (b), *Curling v. Marquis Townshend*, (c) *Const v. Barr* (d).

THE VICE-CHANCELLOR:

The Defendant who now moves for leave to file a Supplemental Answer, seems to have taken an erroneous

(a) 10 Ves. 401.

(b) 2 V. & B. 256.

(c) 19 Ves. 628.

(d) 2 Mer. 57.

view of the Law of Domicile. Domicile does not depend, merely, on the fact of residence in a foreign country; but it arises both from the fact of residence in a foreign country, and acts done by the party shewing that he had selected that country as the place of his permanent abode. A party may not be domiciled in a foreign country, although he resided there at the time of his death.

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TIDSWELL
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I see no reason why the Defendant should not be allowed to file a Supplemental Answer.

Motion granted on payment of Costs.

ANDREWS *v.* LADY BEAUCHAMP.

WALKER *v.* LADY BEAUCHAMP.

1834 :
10th July.
Witness.
Evidence.

IN the original Cause, an Issue had been directed to be tried at the *Staffordshire* Assizes. Afterwards an Order was made, on the application of *Susannah Andrews*, the Plaintiff in that Cause, that the Plaintiff and the Defendants might be at liberty to read, on the Trial of the Issue, the Depositions of such of the Witnesses examined in the Cause, as should be proved, to the satisfaction of the Judge at the Trial, to be either dead, or out of the jurisdiction of the Court, or to be incapable of attending the Assizes from sickness or infirmity, saving just exceptions. After this Order was made, *Susannah Andrews* died, having appointed *Walker* and Wife (who had been examined as Witnesses) *was substituted for the Plaintiff's in the Issue. Ordered that A.'s Depositions should be read at the Trial.*

The Depositions of such of the Witnesses in a Cause, as had died, were ordered to be read at the Trial of an Issue in the Cause. The Plaintiff afterwards died, having appointed *A.*, one of his Witnesses, his Executor. *A.* revived the Suit, and his name

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BEAUCHAMP.

in the Cause on her behalf) her Executors, and, thereupon, *Walker* and Wife revived the original Suit, and an Order was made that the Issue should be amended by substituting their Names for the Name of *Susannah Andrews*, in the Issue and the proceedings subsequent thereon.

Sir *E. Sugden*, for *Walker* and Wife, now moved that their Depositions taken in the original Cause, might be read, at the Trial of the Issue.

Mr. *Phillimore*, for the Defendant Lady *Beauchamp*, opposed the Motion, on the ground that, by the death of *Susannah Andrews*, (who was the Mother of Mrs. *Walker*,) she and her Husband had become so beneficially interested in the subject of the Suit, that their Depositions ought not to be received as Evidence.

The *Vice-Chancellor* granted the Motion, saying that, if Mr. and Mrs. *Walker* had died, their Depositions would have been read at the Trial; and that their having become Plaintiffs, was tantamount to their being dead or being out of the jurisdiction.

It was afterwards arranged that Mr. and Mrs. *Walker* should be examined as Witnesses at the Trial.

CLARK v. SEYMOUR.

BY Lease and Release of the 20th and 21st of September 1824, the Manor and Rectory of *Lambourne Deanery* in the County of *Berks*, and other Hereditaments were limited, as to one Moiety, to the Use of *Hannah Clark* in Fee, and, as to the other Moiety, to the Use of *Hannah Clark* for Life, with Remainder to the Use of *John Withers Clark, Hannah Withers Clark, Mary Ann Clark*, and *Eliza Clark* as Tenants in Common in Fee.

1824 :
12th & 15th
July.

*Power of Sale.
Reversion.*

A Reversion in Fee expectant on a Life-Estate, was settled in strict Settlement, and the Trustees were empowered, at any time thereafter, with the consent of the Tenant for Life under the Settlement, to sell or exchange the Lands for other Lands, in Fee in Possession. The Tenant for Life in possession, together with the Tenant for Life under the Settlement and the Trustees, by their Agent, sold the

By Lease and Release of the 13th and 14th of November 1826, being the Settlement on the Marriage of *Rowland Mainwaring* with *Mary Ann Clark*, the Release being made between *Mary Ann Clark* of the first part, *Rowland Mainwaring* of the second part, and *T. H. Saunders, T. R. Ward* and *R. Strachey* of the third part, *Mary Ann Clark* conveyed her Reversion in Fee in One-eighth part of the Manor and other Hereditaments expectant on the decease of *Hannah Clark*, to *Saunders, Ward* and *Strachey* and their Heirs : To the Use of *R. Mainwaring*, for life, with Remainder to Trustees to preserve &c. with Remainder to the Use of *Mary Ann Clark* for life, with Remainder to Trustees to preserve &c. with Remainder to the Use of all and every, or any one or more of the Children of *R. Mainwaring* and

Estate for one entire Sum. The Purchaser objected that the Power of Sale could not be exercised until the Reversion came into Possession, *but waived all other Objections*. Held that the Power was well exercised, and that the Purchaser, having waived all other Objections, must agree, with the Vendors, as to the apportionment of the Purchase-money between the Life-Estate in Possession and the Reversion, or that the Apportionment must be made by the Master.

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M. A. Clark as they should, by deed or will, appoint, and, in default of such Appointment, To the Use of all their Children equally, as Tenants in Common in Tail, with Remainders over. The Release contained the following Power of Sale and Exchange: " Provided also and it is hereby further agreed and declared by and between the Parties to these Presents, that it shall and may be lawful to and for the said *T. H. Saunders, T. R. Ward* and *R. Strachey*, and the Survivors or Survivor of them, and the Executors and Administrators of such Survivor, at any time or times hereafter, at the request and by and with the consent and approbation of the said *R. Mainwaring* and *Mary Ann Clark* jointly during their joint lives, or of the Survivor of them during his or her life, to be signified in writing under their, his or her hands and seals or hand and seal, and, after the decease of the Survivor of them, then of his and their own proper authority, and at their and his discretion, to sell or dispose of and to convey, either by way of absolute sale, or in exchange for other Hereditaments in Fee Simple in possession, to be situate in *England* or *Wales*, the whole or any part or parts of the said undivided Eighth Part or Share of the said *Mary Ann Clark* of and in the said Manor and other Hereditaments hereby granted and released, and the inheritance thereof in Fee Simple, to any Person or Persons whomsoever, for such Price or Prices in Money, or for such equivalent or recompense in Lands, Tenements or other Hereditaments, as to them the said *T. H. Saunders, T. R. Ward* and *R. Strachey*, or the Survivors or Survivor of them or the Executors or Administrators of such Survivor, shall seem reasonable: And that, for effectuating such Disposition or Dispositions, Conveyance or Conveyances, but not for any other purpose, it shall and may be law-

ful to and for the said *T. H. Saunders, T. R. Ward* and *R. Strachey* and the Survivors or Survivor of them and the Executors or Administrators of such Survivor, by any Deed or Deeds, Instrument or Instruments in writing to be sealed and delivered by them or him in the presence of and attested by two or more credible Witnesses, absolutely to revoke, determine and make void all and every or any of the Uses, Trusts, Powers and Provisions in and by these Presents limited of and concerning the Hereditaments and Premises which shall be so sold or agreed to be given in exchange as aforesaid, except the subsisting Leases if any such should then have been made under and by virtue of the power for that purpose hereinbefore contained, and, by the same or any other Deed or Deeds, Instrument or Instruments in writing, to be signed, sealed, delivered and attested as aforesaid, to limit, declare, direct and appoint any other Use or Uses, Estate or Estates, Trust or Trusts of the said Hereditaments and Premises so sold or agreed to be given in exchange, which it shall be thought necessary or expedient to limit, declare or appoint in order to effectuate such Sale or Sales, Exchange or Exchanges, Dispositions or Conveyances as aforesaid: and, upon every such Exchange as aforesaid, causing the Hereditaments which shall be received or taken in exchange, to be conveyed and settled to, for and upon such and the same Uses, Trusts, Intents and Purposes, and with, under and subject to such and the same Powers, Provisoes, Limitations and Agreements as the Hereditaments and Premises so given in exchange stood limited to, immediately before and at the time of such exchange or exchanges: and also that it shall be lawful to and for the said *T. H. Saunders, T. R. Ward* and *R. Strachey*,

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and the Survivors and Survivor of them, or to or for the Executors or Administrators of such Survivor, to receive or take any Sum or Sums of Money by way of equality of Exchange. And it is hereby agreed and declared that, upon the receipt of the Monye or Monies arising by any such Sale or Sales, or agreed to be given for equality of Exchange or Exchanges, it shall and may be lawful to and for the said *T. H. Saunders, T. R. Ward* and *R. Strachey*, and the Survivors or Survivor of them, and the Executors and Administrators of such Survivor, or other the Trustees or Trustee for the time being, to give and sign a Receipt or Receipts for such Money or Monies, and such Receipt or Receipts shall be a sufficient Discharge or Discharges to any Purchaser or Purchasers or other Person or Persons paying the same, for the Purchase-money or Purchase-monies, or Money or Monies received for equality of Exchange, for which the same shall be so given, and such Purchaser or Purchasers, or other Person or Persons, his, her or their Executors, Administrators or Assigns shall not be answerable or accountable for any loss or misapplication of such Monies, or be obliged or concerned to see to the application thereof. And it is hereby agreed and declared by and between all the Parties to these Presents that, when any part or parts of the said Hereditaments and Premises shall be sold for a valuable consideration in Money, or when any Sum or Sums of Money shall be received upon any such Exchange or Exchanges as aforesaid for equality, they the said *T. H. Saunders, T. R. Ward* and *R. Strachey* and the Survivors or Survivor of them, or other the Trustees or Trustee for the time being of these Presents, shall lay out and invest the Money arising out of such Sale or Sales, or so received for equality as aforesaid, in the

purchase of other Hereditaments in Fee Simple *in possession*, to be situate in *England* or *Wales*, of a clear, indefeasible Estate of Inheritance in Fee Simple *in possession*, or in Copyhold Lands or Tenements of Inheritance in possession, intermixed with the Hereditaments so to be purchased as aforesaid, so as such Copyhold Lands or Tenements do not exceed one fourth part of the value of the Hereditaments so to be purchased as aforesaid: And that they the said *T. H. Saunders*, *T. R. Ward* and *R. Strachey* and the Survivors, &c. or other the Trustee or Trustees for the time being, shall settle and assure, or cause to be settled and assured the Hereditaments so to be purchased, to such and the same Uses, upon such and the same Trusts, and with under and subject to such and the same Powers, Provisoes Conditions and Agreements, as are in and by these Presents limited, expressed and declared of and concerning the same Hereditaments which shall be so sold or given in exchange, and from which such Monies arose, or as near thereto as the deaths of Parties and other intervening circumstances will then admit of: And also that, until the Monies arising by such Sale or Sales as aforesaid, or to be received for equality as aforesaid, shall be disposed of in the manner hereinbefore mentioned, it shall and may be lawful to and for the said *T. H. Saunders*, *T. R. Ward* and *R. Strachey*, and the Survivors, &c., to place out such Sum or Sums at Interest, either in the Parliamentary Stocks or Public Funds of *Great Britain*, or upon Real Security or Securities in *England* or *Wales*, in the Names or Name of such Trustees or Trustee for the time being, and to alter, vary and transpose such Stocks &c. And it is hereby further declared and agreed by and between all the said Parties to these Presents, that the

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Dividends, Interest and Annual Produce arising from such Stocks, Funds or Securities, shall go and be paid to such Person or Persons, or be applied to and for such ends, intents and purposes, and in such manner as the Rents and Profits of the said Hereditaments so to be purchased therewith as aforesaid, would go or be payable or applicable unto, in case such Purchase or Purchases and Settlement were then actually made."

By Lease and Release of the 30th and 31st of May 1828, being the Settlement on the Marriage of *Robert Pedder* and *Eliza Clark*, the Release being made between *Eliza Clark*, of the first part, *R. Pedder*, of the second part, *M. H. Goodman*, *J. C. Townshend* and *Sir C. Price* of the third part, *Eliza Clark's* Reversion in Fee expectant on the decease of *Hannah Clark*, in one other eighth part of the Estates, was limited to Uses, for the benefit of *R. Pedder* and *Eliza Clark* and their Children, similar to those limited, by the Release of the 14th of November 1826, for the benefit of *R. Mainwaring* and *Mary Ann Clark* and their Children. The Release of the 31st of May 1828 contained a Power commencing as follows: " Provided also and it is hereby further agreed, by and between the said Parties to these Presents, that it shall and may be lawful to and for the said *M. H. Goodman*, *J. C. Townshend* and *Sir C. Price* and the Survivors or Survivor of them and the Executors or Administrators of such Survivor, at the request and by and with the consent and approbation of the said *R. Pedder* and *Eliza Clark* jointly, during their joint lives, or of the Survivor of them during his or her life, to be signified in writing under their, his or her hands and seals or hand and seal, and, after the death of the Survivor of

them the said *Rt. Pedder* and *Eliza Clark*, during the Minority of any Child or Children of the said intended Marriage, who, if of full age, are to be entitled to the said Hereditaments and Premises hereby granted and released or any part thereof, then, at the discretion of the said *M. H. Goodman*, *J. C. Townshend* and Sir *C. Price*, or the Survivors or Survivor of them or the Executors or Administrators of such Survivor, to join and concur with the Person or Persons for the time being seised of or entitled to the said other Parts and Shares of the Manor, Rectory, Messuages, Lands, Tithes, Hereditaments and Premises, one undivided Eighth Part or Share of which is hereinbefore granted, released and confirmed or expressed and intended so to be, in making a Partition or Division of the said Manor, Rectory, &c., or any part thereof, and, also, to sell or dispose of and to convey, either by way of absolute Sale or in Exchange for other Hereditaments in Fee Simple in Possession, to be situate, &c." The subsequent part of the Power was similar to the Power of Sale and Exchange in the Release of the 14th of November 1826, except that it provided for Partition as well as Sale and Exchange.

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The Bill was filed by *Hannah Clark*, *John Withers Clark*, *R. Mainwaring*, and *Mary Ann* his Wife, *Robert Pedder* and *Eliza* his Wife, and the Trustees of their Settlements: and, after setting forth the beforementioned Deeds, it stated that, in Feb. 1832, the Plaintiffs authorized *T. B. Merriman* to sell a certain part of the Estates by private Contract; and, accordingly, *Merriman*, with the privity and consent of all the Plaintiffs, agreed with the Defendant, to sell the Premises to him for 6,295 l.; but that the Defendant refused to com-

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plete his Purchase, alleging that the Powers of Sale contained in the Settlements, could not be exercised during the life of *Hannah Clark*, and more especially as she was not a Party to those Settlements.

The Bill prayed for a specific Performance of the Contract.

The Defendant, in his Answer, said he had been advised that it was doubtful whether the Powers of Sale could be exercised during the life of *Hannah Clark*, and that he ought not to complete his Purchase without obtaining the Opinion of the Court thereon; and added that he waived all other Objections to the Title, and was ready to complete his Purchase, if the Court should be of Opinion that the Powers could be exercised.

Sir *E. Sugden* and Mr. *Phillimore* for the Plaintiffs:

The Question is whether the Powers of Sale can be exercised, so long as the Interests of the Tenants for Life under the Settlements, are Reversionary; inasmuch as, when the Property is sold and the Purchase-money laid out, the Interests of those Tenants for Life will become Interests in Possession.

The Estates are stated, in the Settlements, to be Reversionary; and the Powers of Sale are general. Why, then, are not the Trustees to exercise the Powers when they have got the proper consents? It would have been easy to say, if the Parties had so intended, that the Powers should not be exercised until the Estates came

into possession. Whether it was prudent to give the Powers, is one question: whether they are given, is another. It may be, however, more advisable to sell an Estate in Reversion than an Estate in Possession. If the Estate had been let on Lives, the Trustees might have sold it. The Tenants for Life under the Settlements are willing to take their proportion of the Money; so that the only objection that could arise, is removed. [The *Vice-Chancellor*:—As I understand it, the sale has been made of the Interests in Possession and in Reversion, for one entire Sum. How is the Money to be paid to the Trustees?] Nothing is so easy as to apportion the Purchase-money between Mrs. *Clarke* the Tenant for Life, and those in Remainder.

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The Case of *Fry v. Fish* (a) is an authority for us, so far as it goes; but we want no authority, as the Powers of Sale are absolute, and we are willing to take our proportion of the Money.

Mr. *Tinney* and Mr. *Sidebottom*, for the Defendant:

The Defendant is a Purchaser, and, therefore, cannot be compelled to take a doubtful Title: but he is a willing Purchaser, and is desirous to complete his Purchase provided a good Title can be made.

This is the Case of a Legal Power, and not of an Equitable Trust; and the question must be viewed as if it had come before a Judge in a Court of Law.—Powers of Sale are connected with the possession, and are, generally, required to be exercised with the consent of the party in possession. If the Powers had been Powers of

(a) 2 Sugd. Pow. 488.

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Leasing, they could not have been exercised until the Tenants for Life under the Settlements came into possession. *Coze v. Day (b)*.

It appears, from the language of the Powers, that they were not intended to be exercised until the Tenants for Life were in possession. The Powers are Powers of Exchange as well as of Sale. It is expressly provided that the Lands are to be exchanged for other Hereditaments in Fee Simple *in possession*. The very term, *exchange*, implies equality of interest : that Power, therefore, could not arise until an Estate in possession could be given in exchange for an Estate in possession. If an Estate in possession were taken in exchange, the Husbands would immediately take Life-interests ; so that the Lands taken in exchange, would belong to other persons than the Lands given in exchange, and the interests of the Children would be prejudiced ; for the Estate in possession would, of course, be less valuable than the Estate in reversion. The terms of the Power are stronger, if possible, with respect to a Sale, than they are with respect to an Exchange. The Money arising from a Sale, is to be laid out in the purchase of Lands of a clear indefeasible Estate of Inheritance in Fee Simple in possession ; so that the same objection applies to a Sale as to an Exchange. There is no difference between the Powers, in the two Settlements, except that the words : "at any time or times hereafter," in Mrs. *Mainwaring's* Settlement, do not occur in Mrs. *Pedder's* Settlement. Both the Powers speak of the *Lands*, and not of the *Reversion*, as the thing to be sold or exchanged, and, therefore, they must be construed as Powers to be exercised, when the *Lands* can be sold or exchanged ; consequently they do not

(b) 13 East. 118.

arise until the death of Mrs. *Clark*. *Fry v. Fish* does not apply; for, there, the Power of Sale over-rode the Estate of the Tenant for Life.

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It is not imperative, on the Trustees, to sell: and, as there is now no special reason for a Sale, they will be guilty of a Breach of Trust; for they will give immediate interests to the Parents, in derogation of the rights of the Children: and, if the Powers are not well exercised, the Children, when they come into possession, may eject the Purchaser.

The Estate has been sold for one gross Sum: there has been no Contract for the Sale of the Reversion for any particular Sum: how then can the Trustees say what part of the Purchase-money is to be taken as the value of the Reversionary Interest?

Sir *E. Sugden*, in reply:

When an Estate settled on one for life, with Remainders over, is sold, the Tenant for Life and the Reversioner always arrange between themselves what proportion of the Money each is to have. In this Case the value of the Life-Interest may be calculated according to the Tables.

The VICE-CHANCELLOR:

I have no doubt that the Trustees can sell the Reversion at any time; for terms are used in the Settlements which are applicable to an immediate Sale; and there can be no doubt about the meaning of the expressions. But, with respect to the other question. By the Powers of Sale the Trustees are to exercise a discretion as to the value of the Estate which they sell; and, before they part with the Estate, they must have a separate

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consideration. But how can I apportion the Money in this Suit; for a conflict might arise between the Co-plaintiffs, as to the Shares which they are respectively entitled to. The Purchaser, too, ought to be a Party to the question, what is the Sum to be given for the Reversion: for the Estate has been sold for one gross Sum, and, if the Trustees were to tender to the Purchaser a receipt for any particular Sum, as being the price of the Reversion, he might say that he never agreed to give that Sum for the Reversion.

Sir E. Sugden:

The Court cannot assume that that will not be done, which ought to be done. If the Vendors cannot agree amongst themselves, as to the Apportionment of the Money, it may be referred to the *Master* to settle the proportions. The Purchaser has no right to interfere with the division of the Money between the Sellers: if he had, I do not see how any Contract is to be completed. He has no right to say that he did not agree for the purchase of the Reversion at the Sum apportioned for it. At all events, he has only a right to see that there has been, *prima facie*, a fair division of the Money.

Mr. Tinney:

The Children are not Parties to this Suit: and, if the Purchaser were to agree to any particular apportionment, he would do it at the risk of being wrong and of suffering by the consequences.

The VICE-CHANCELLOR:

On referring to the Answer, I see that the Purchaser has waived every Objection, except that which

arises on the construction of the Powers of Sale. The Bill sets forth the nature of the Title; and, therefore, the Purchaser must have been aware that the Contract could not be performed, unless the Purchase-money was apportioned. But, where, as in this Case, a Contract has been made by a person as Agent for all parties, I am clearly of opinion that it is not competent to the Trustees alone to say that a certain Sum shall be considered as the value of the Reversion, and a certain Sum as the value of the Life-Interest. The Purchaser has a right to exercise his judgment, fairly, on the subject, and to take care that a reasonable Apportionment is made.

As I am of opinion that the Objection arising on the Power of Sale is not tenable, and as the Purchaser has, by his Answer, precluded himself from making any other Objection to the performance of his Contract, he and the Trustees must agree, between themselves, as to the Division of the Money; and, if they cannot agree, it must be referred to the *Master* to make the Division for them.

The Decree declared that a good Title could be made to the purchased Premises, notwithstanding the Objection, raised by the Answer, as to the exercise of the Power, and referred it to the *Master* to apportion the Purchase-money, having regard to the Interests of the Parties.

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*Specialty
Debt.*

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BARKER v. WARDLE.

Testator bequeathed his Personal Estate to *A. B. & C.* his Executors, in Trust to invest two Sums of 600 *l.* in their Names, for his Daughters for life, and, after their deaths, for their Children. *A.* and *B.* alone acted. *A.* paid the Interest of the two Sums to the Daughters, but did not invest the Principal. *B.* executed a Mortgage to *A.* and *C.* for securing 1,300 *l.* part of the Testator's Estate possessed by him, and died. His Executors paid off the 1,300 *l.* and *A.* and *C.* joined in assigning the Mortgage to them and in signing a receipt for the Money. *A.* died having executed a Deed Poll, reciting that the Testator gave all his Personal Estate to *A. B. & C.* upon certain Trusts mentioned in his Will, and acknowledging that *A.* had received the whole 1,300 *l.*, and that *C.* joined in the Assignment and Receipt, for conformity only. Held that, under the Deed Poll, the *cestuique* Trusts of the two Sums of 600 *l.*, were Specialty Creditors of *A.*

Costs. Legatee. Creditors' Suit.—An Executor paid Interest on a Legacy and died. The Legatee filed a Bill, for payment of the Principal, against the Executor's Representative. The Legatee afterwards presented a Petition, consenting to abandon his Suit and praying for liberty to prove, for his Legacy and for the *Costs of his Suit and of the Petition* against the Executor's Estate, in a Suit subsequently instituted by Creditors of the Executor. The Prayer of the Petition was granted.

attaining 21, *Wormald* and *Reynolds* paid to each of them a Moiety of 1,200*l*.

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Mary Brook married *Thomas Jenks*, and *Martha Brook* married *C. R. Turner*.

Some time before 1825, *Reynolds* died, having accounted to *Wormald* for the Testator's Personal Estate possessed by him, and having executed to *Wormald* and *George Brook* a Mortgage for securing 1,300*l*., being part of such Personal Estate.

Reynolds, in his lifetime, paid to *Wormald* 593*l*. 13*s*. 2*d*., part of the 1,300*l*.; and, after his death, his Executors paid the remainder to *Wormald*; and, thereupon, *Wormald* executed a Deed Poll, dated the 29th of June 1825, which recited that the Testator, by his Will, after directing his Debts and Funeral Expenses to be paid, gave all his Personal Estate to *Wormald*, *Reynolds* and *George Brook*, upon certain Trusts therein mentioned: that the Testator died in 1804, and *Wormald* and *Reynolds*, alone, proved his Will, and took upon themselves the Execution thereof, *George Brook* having declined to join therein: that *Reynolds*, having got in part of the Testator's Estate, for securing the Repayment of 1,300*l*., part thereof, with Interest, executed to *Wormald* and *George Brook*, a Mortgage Deed dated the 1st of May 1806; but that *George Brook* became a Party to, and executed that Deed for the sake of conformity only: and that, by an Indenture dated the 29th of June 1825, indorsed on the Mortgage Deed, and made between *Wormald* and *George Brook*, of the one part, and *Reynolds*'s Executors of the other part, after reciting that the 593*l*. 13*s*. 2*d* had

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been paid as before mentioned, and that 706*l.* 6*s.* 10*d.* then remained due on the Mortgage, *Wormald* and *George Brook*, in consideration of the 706*l.* 6*s.* 10*d.* mentioned to be paid to them by *Reynolds's* Executors, surrendered to them the Mortgaged Premises. The Deed Poll further recited that *George Brook* never acted in the execution of the Trusts of the Testator's Will except for the sake of conformity, and never received any part of the Testator's Estate: And it witnessed that the 593*l.* 13*s.* 2*d.* and 706*l.* 6*s.* 10*d.*, and the Interest thereof, were paid to *Wormald* alone (as he did thereby admit and acknowledge) and that *George Brook* joined, for conformity only, in executing the before-mentioned Indentures and in signing the Receipt for the Mortgage-money.

In March 1815, *Mary Jenks* died, leaving three Daughters who afterwards attained 21. During the lifetime of *Mary Jenks*, *Wormald* paid to her the Interest of 600*l.*, and, after her death, he paid the Interest to her Husband, for the Maintenance of her Daughters. In July 1831 one of the Daughters came of age, and, thereupon, *Wormald* paid her 200*l.* for her Share of the 600*l.*; and he continued to pay the Interest of the remainder for the Maintenance of the two other Daughters down to January 1832. *Wormald*, also, paid to *Martha Turner* the Interest of 600*l.* down to July 1832, but he never invested either of those Sums as directed by the Will, although he had paid over part of the Testator's Residuary Estate, to his Residuary Legatee.

In December 1832 *Wormald* died, having appointed the Defendants his Executors.

In 1833, Mr. and Mrs. *Turner* and their Children filed the Bill in the first Suit, praying that the 600 *l.* to which they were entitled, might be laid out and invested upon the Trusts of the Testator's Will.

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In Hilary Term 1834, the Bill in the second Suit was filed by *T. H. Barker*, on behalf of himself and the other Creditors of *Wormald*; and, on the 20th of January in that year, the usual Decree was made in that Suit.

Afterwards a Petition was presented in the two Suits, by the Plaintiffs in the first Suit, and by the two younger Children of Mr. and Mrs. *Jenks*, stating to the effect before mentioned, and that the Plaintiffs in the first Suit were willing to desist from further prosecuting that Suit, upon being allowed to go in under the Decree in the second Suit, and prove for the 600 *l.* and Interest due to them, and for their Costs of the first Suit and of the Petition and consequent thereon; and submitting that, under the circumstances before mentioned, *Wormald* had admitted Assets of the Testator, sufficient to pay what was due to all the Petitioners under the Testator's Will, and that, under the Deed Poll, they were entitled to stand as Specialty Creditors of *Wormald*. The Petition prayed that the Petitioners might be at liberty to prove, in the second Suit, the Principal and Interest due to them respectively under the Will, the Costs of the first Suit and of the Petition and consequent thereon, as a *Specialty Debt* due from *Wormald's* Estate.

Sir *E. Sugden* and Mr. *Barber*, for the Petitioners, said that, by the Deed Poll, *Wormald* had declared,

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under his hand and seal, that he held the Money due to the Petitioners, upon the Trusts of the Testator's Will, and that such Declaration amounted to a Covenant, and, therefore, the Petitioners were entitled to prove, as Specialty Creditors, against *Wormald's Estate*. *Gifford v. Manley (a)*, *Mavor v. Davenport (b)*, *Salton v. Houston (c)*.

Mr. *Turner*, for the Defendants :

In *Gifford v. Manley*, articles had been executed under which the Money was to be invested by the Trustees. One of the Trustees received the whole of the Money, and gave an Acknowledgment, under his hand and seal, to that effect.

But it appears, from the language of The *Lord Chancellor* in that Case, that the Money due was held to be a Specialty Debt, not by virtue of the Acknowledgment; but of some Contract that the Trustee had entered into to invest the Money. Here there is no Contract on the part of *Wormald* to invest the Money, but merely a simple Bequest to him in Trust to invest it. *Wormald* executed the Deed Poll for the purpose merely of acknowledging that he had received the whole of the 1,300 *l.*, and to prevent *Geo. Brook* (who had joined, for the sake of conformity only, in Surrendering the Mortgaged Premises and signing the Receipt for the Money) from being charged with any part of it. Is a person who is no Party to a Deed to be placed in a better situation by the effect of it? There is nothing in the Deed Poll to fix a Trust, on the 1,300 *l.*, for any

(a) Ca. Temp. Talb. 109.

(c) 1 Bing. 433.

(b) *Ante*, Vol. 2, 227.

particular Legatees, nor does the 1,300 *l.* represent the Petitioner's Legacies: the Sums are not identical. There was a third Sum of 1,200 *l.* which the Will directed to be invested (*d*). There is no Case in which it has been decided that words of simple Declaration constitute a Party a Specialty Creditor. The Deed Poll, in this Case, could not convert the Legatees, who were no Parties to it, from simple Contract Creditors into Specialty Creditors.

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The VICE-CHANCELLOR:

The Will created an Obligation on *Wormald* and his Co-Trustees to lay out certain Portions of the Testator's Assets in Government or Real Securities, and the Deed Poll was an Acknowledgment, under his hand and seal, that he held the 593 *l.* 13 *s.* 2 *d.* and 706 *l.* 6 *s.* 10 *d.* under that Obligation. It was the same, in effect, as if he had received the Money under the Deed. The consequence is that the Money must be taken as a Specialty Debt due to those Persons whose Shares of the Fund have not been paid; and the Costs of the Petitioners' Suit and of the Petition, must be paid out of *Wormald's* Estate (*e*).

(*d*) This fact did not appear upon the Petition, but the Counsel for the Petitioners admitted it.

(*e*) See *Harvey v. Harvey*, Madd & Geld. 91.

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14th July.

Will.
Construction.
Residence in
England.

SCHNELL v. TYRRELL.

FRANCIS SCHNELL made his Will, dated the 17th of December 1821, and which was, partly, as follows: "I place my three Grandchildren, namely, *Louisa Schnell*, and *John Macdonald Schnell*, the Children of my dearest eldest Son, *John Stuart Schnell*, who died in *India* a Captain in the *East India Company's* Service, and *Frank Macdonald Schnell*, the Son of my dearest youngest Son, *Charles Vaughan Schnell*, who died in *India*, also, a Captain in the same Service, under the Protection and Trust of the Hon. *George Percy*, commonly called Lord *Lovaine*, and the Hon. *James Archibald Stuart Wortley*, who have, both, generously consented to take that charge upon themselves." The Testator then gave, out of the Interest of his Property, the annual Sum of 20*l.* to the Widow of his Son, *John Stuart Schnell*, for her life; the annual Sums of 40*l.*, 55*l.*, and 40*l.*, for the Education and Maintenance of *Louisa Schnell*, *John Macdonald Schnell*, and *Frank Macdonald Schnell* respectively, until they were 24 years old, and directed that the remainder of the Income of his Property should be accumulated for their benefit: and he directed that each of his before-

Testator, by his Will, placed the Son and Daughter of his deceased Son, under the protection and trust of his Trustees, and provided certain annual Sums for their Maintenance, until they attained 24, when each of them was to receive a Legacy of 1,500 *l.*; but if their Mother should *fix* with her Children out of *England*, their Allowances were to be reduced: and, if the Son did not remain in *England* under the protection of the Trustees, he was to forfeit his Legacy. The Mother took her Children, to *India* during their Infancy, but returned to *England* four years afterwards. The Son, having obtained a Commission in the Army, shortly after his return, joined his Regiment in *India*. Afterwards, and whilst he was still under 21, he returned to *England* on account of illness, and remained there about three years, and then, having attained 21, he rejoined his Regiment in *India*. Held that the Son had incurred neither a Forfeiture of his Legacy, nor a Reduction of his Allowance.

mentioned Grandchildren should receive, when 24 years old, the Sum of 1,500*l.*, and that, when *Frank Macdonald Schnell*, the youngest of his three Grandchildren, should have attained 24, and should have received his 1,500*l.*, the remainder of his Property should be equally divided between his three Grandchildren, and, if one or two of them should die before that time, that the others or other should share equally the remainder.

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The Testator then expressed himself as follows : “ If my Daughter-in-law, *Mrs. John Schnell*, should fix with her Children anywhere out of England, then *Louisa’s* Allowance shall be reduced to 30*l.*, and that of *John*, her Brother, to 35*l.*, and these Reductions shall be added to the yearly Savings. *Mrs. John Schnell*, if determined to return to *India*, may take *Louisa*, her Daughter, with her, but *John Macdonald Schnell*, her Son, shall remain in *England*, or any part of *Europe*, under the Protection of his noble and generous Trustees, otherwise he shall forfeit, to the Profit of *Frank Macdonald Schnell*, the 1,500*l.* which he, *John Macdonald Schnell*, would otherwise receive when 24 years old. Should future circumstances require any immaterial or necessary Alteration to be made in this Will, it is left to the judgments of the Noble and Honourable Trustees so to do. I wish my Executor to be *John Tyrrell*, Esq., of *Lincoln’s-Inn*, *London*, if so approved by the above-mentioned Trustees.”

The Testator died in September 1823. In 1824 *Mrs. John Schnell* went to *India*, and took her two Children with her ; and, thereupon, the Executor reduced the Allowances for their Education and Maintenance, as

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directed by the Will. In June 1831, the Bill was filed by *Francis Macdonald Schnell*, against the Trustees and the Executor and the Parties beneficially interested under the Will, for the usual Accounts of the Testator's Personal Estate, and to have the Plaintiff's Rights and Interests, under the Will, ascertained and secured.

At the hearing of the Cause, in February 1833, it was referred to the *Master* to inquire and state whether the Defendant, *John Macdonald Schnell*, went Abroad, and how often, and to what Place or Places, and under what Circumstances, and whether induced by any and what Representation, of any and what Person or Persons.

The *Master's* Report set forth an Affidavit, made by Mrs. *John Schnell*, stating that *Louisa Schnell* and *John Macdonald Schnell* were born in *India*, on the 2d of December 1805, and the 31st of January 1810, respectively: and that the Deponent having occasion to go to *India*, left *England* in October 1824, not with any intention of fixing her Abode or taking up her Residence there, and that, having effected her object, she returned to *England* in 1828: that, being in *Germany* when the Testator died, she came to *England* shortly after his death, and had considered herself domiciled in *England* ever since; and that she did not go to *India* for upwards of a year after the Testator's death, up to which time the Trustees had not taken the care or charge of her Children, nor had they ever since taken either of them under their Protection: that, upon her going to *India*, she could not leave her Children behind her without great inconvenience and expense,

and, therefore, took them with her : that, upon her Son's return, he found that his Friends had procured for him a Commission in the 6th Regiment of Foot, which was then in *India*, and, thereupon, when it was discussed whether his joining his Regiment would subject him to the Forfeiture of his 1,600 *l.* under the Testator's Will, the Plaintiff repeatedly promised her Son, before his Departure, and often declared afterwards, that, if any Forfeiture of the Legacy should be occasioned by his leaving *Europe*, he, the Plaintiff, would not take advantage of it ; and that she verily believed that her Son was induced to go to *India* by such promises : that her Son was, afterwards, sent home on a Sick Certificate, and arrived in *England* in 1829, and that, upon being ordered to join his Regiment, which was still in *India*, he left *England* for *India* in 1832. The Report, also, set forth an Affidavit, made by the Testator's Widow, which was to the same effect, as to the Circumstances and Inducements under which *John Macdonald Schnell* went to *India*.

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The *Master* found that *John Macdonald Schnell* went abroad at the Times, and to the Places, and under the Circumstances, and induced by the Representations before stated.

The Cause now came on for further Directions.

Mr. *Knight* and Mr. *Girdlestone*, jun., for the Plaintiff, said that the Mother's Affidavit was made under a strong bias in favour of her Son, and that the Affidavit of the Testator's Widow was made under a strong bias against the Plaintiff, with whom she had quarrelled :

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that the Promises alluded to, were made when *Francis Macdonald Schnell* was only 13 or 14 years old: that no Promise was stated to have been made on *John Macdonald Schnell*'s last departure for *India*: that he attained 21 in 1831, and that the Testator clearly contemplated a going Abroad during Minority as well as afterwards: that Mrs. *John Schnell* was absent with her Children, in *India*, for four Years, and that no Motive was assigned for her going there: that the language of the Will was express and positive, that *John Macdonald Schnell* should remain in *Europe*, otherwise he should forfeit his Legacy: that he was still under 24 years of age, and had, already, gone three times to *India*.

Sir *E. Sugden* and Mr. *Walker* appeared for the Defendant *J. M. Schnell*: but

The VICE-CHANCELLOR, without hearing them, said:

The expressions used by the Testator are not applicable to the events that have happened. His intention was to prevent the Widow of his Son from having the tuition of her Children permanently abroad. The Term 'fix' implies a permanent Residence. When the Testator used the word 'remain,' he meant the same thing, with respect to the Son, as he did with respect to the Mother, when he used the word 'fix.' In neither case did he contemplate a mere temporary absence from *England*.

In 1834 the Mother went to *India* for a particular purpose only, of which we have the best Evidence by

her returning to *England* in 1828, and, therefore, she did not fix with her Children out of *England*.

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It appears that, during the Son's absence in *India* with his Mother, his Friends had procured for him a Commission in the Army, and that, shortly after his return, he went out again to *India* to join his Regiment: that, in 1829, he was sent home on a Sick Certificate, and that, in 1832, he again returned to *India*. The Testator did not mean that *John Macdonald Schnell* should forfeit his Legacy, if he went abroad either in the Army or in the Navy, but the Testator's intention was that he should forfeit his Legacy if he went and remained abroad under the dominion of his Mother.

As, in my Opinion, the Mother did not fix with her Children out of *England*, and her Son has sufficiently remained in *England* to satisfy the words of the Will, his Annuity ought not to have been reduced, nor has he incurred a Forfeiture of his Legacy.

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15th, 16th &
18th July and
7th & 20th
August.

TWYFORD v. TRAIL.

Representation.

A. died in *India*. *B.* one of his Executors proved his Will in *India*. *B.* died, and *C.* his Executor, proved his Will in *England*. *C.* is not the Personal Representative of *A.*

Breach of Trust. Partners.

A. a Partner in a house of Agency in *India*, died, having by his Will, directed his Estate to be called in, and

invested on certain Trusts, and appointed two of his Copartners his Executors. They, however suffered his Share in the Partnership to remain in the House. After *A.*'s death, *B.* and *C.* were admitted as Partners, and they knew that *A.*'s Share was remaining in the House, and that it was subject to the Trusts of his Will. They afterwards retired, and other Partners were admitted. The House ultimately failed. Held that *B.* and *C.* were not responsible for the Breach of Trust committed by their Copartners, the Executors.

BY an Indenture, dated the 1st of May 1809, *John Palmer, William Logan, Patrick Maitland, George Augustus Simpson* and *William Hall* agreed to become Partners, as Agents or Factors, at *Calcutta*, for three years from the date of the Deed, under the Style or Firm of *Palmer & Co.*; and it was agreed that the Profits of the Partnership should be divided into 24 Parts, and that *George Augustus Simpson* should be entitled to five of such Parts, and that the remainder should be divided amongst the other Partners as therein mentioned: and it was also agreed that the Accounts of the Partnership should be made out on the 1st of May in every year; and that, if any of the Partners should die before the end of the Partnership Term, the Survivors should, in full of his Share of the Capital, Stock, and Profits of the Partnership, pay, to his Executors, within six months after the Accounts of the year in which he should die should have been made up, so much Money as would have been due to the deceased if he had been living at the last settlement of Accounts.

Not long after the formation of the Partnership, *William Logan* died, and, after his death, the surviving Partners, under a Proviso for that purpose contained in the Deed, carried on the Business, under the Firm of *Palmer & Co.*, upon the same terms as before.

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In March 1811 *George Augustus Simpson* died, leaving his Wife, (who afterwards married *John Maitland*) and three Children, the eldest of whom was only five years old, him surviving. *George Augustus Simpson*, by his Will, appointed *Patrick Maitland*, *William Hall* and his Brother, *James Archibald Simpson*, his Executors; and he gave to them all his Personal Property, in Trust, as soon as conveniently might be after his decease, to convert the same into Money and invest it, either in Government Securities in *India*, or in the Public Funds in *England*, and to pay 800 *l.* a year to his Wife, during the Minority of his Children, and, on their attaining 21, to divide his Property, in certain proportions, between his Wife and Children. In March 1811, *William Hall* and *James Archibald Simpson* proved *George Augustus Simpson's* Will, in *Calcutta*. Shortly after *George Augustus Simpson's* death, his Widow and Children returned to *England*; and the Widow opened an Account with the House of *Cockerell, Trail & Co.* of *London*, as her Bankers; and *Trail*, who was connected with her by Marriage, acted as her Friend or Agent in respect of her late Husband's Property in *India*. The House of *Cockerell & Co.* were, also, the Agents, Consignees and Correspondents of *Palmer & Co.* After *George Augustus Simpson's* death, the Business of the *Calcutta* House was carried on as before, by the Surviving Partners; and, by an Account made out by them on the 1st of May 1811, it appeared that a Balance of

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280,526 Rupees was due to the Estate of *George Augustus Simpson*, in respect of his Share of the Capital, Stock and Profits of the Partnership. This Balance was not paid to the Executors; but they suffered it to be retained by *Palmer & Co.*, who opened an Account in their Books, which was headed: "Estate of *George Augustus Simpson*, in Account with *Palmer & Co.*;" and *Palmer & Co.* from time to time, received further Sums of Money on Account of the Estate, and, from time to time, sent to *Cockerell & Co.*, Accounts of the Monies in their hands belonging to the Estate, and made Remittances to them on account of the interest of such Monies: and they debited themselves with and gave credit to the Estate for the Sums which they received, and took credit for, and debited the Estate with the Sums which they paid on account of it.

Soon after *George Augustus Simpson's* death, his Surviving Partners signed a Memorandum, by which they agreed that his Executors should, from the 1st of May 1811 to the 30th of April 1812, receive three-twenty-fourths of the Profits of the House of *Palmer & Co.*, for the purpose of enabling them to improve the Widow's Income, and, generally, for the Benefit of her late Husband's Estate as the Firm might thereafter direct.

In the year 1814, *Patrick Maitland* returned to *England*; and, in November of that year, he proved *George Augustus Simpson's* Will, in the Prerogative Court of *Canterbury*. In 1818 *William Hall* died, having appointed *Henry Trail* his Executor in *England*, and *John Palmer*, *Patrick Maitland*, *Francis Tipping*

Hall and two other Persons his Executors in *India*; and *Francis Tipping Hall* alone proved his Will in *India*. About the year 1820 *Francis Tipping Hall*, and *John Brownrigg* were admitted as Partners in the Firm of *Palmer & Co.*; and, in the same year, *Henry William Hobhouse*, who had been a Partner in the Firm, and had retired from it in the lifetime of *William Hall*, was re-admitted a Partner. The new Partnerships successively assumed and adopted the Debts, Credits and Accounts of the former Partnerships; and the Accounts of the Monies belonging to *George Augustus Simpson's* Estate were entered in the Books of the House as before; and the Dealings and Transactions of the House, in respect to those Monies, were continued. *Trail*, as the Agent or Friend of *Mrs. Maitland*, frequently urged *Palmer & Co.* to invest the Monies in their hands belonging to *George Augustus Simpson's* Estate, in Government Securities in *India*, and, in March 1820, they did invest 100,000 Rupees, part of that Balance, in a Government Note.

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In January 1821 *Patrick Maitland* died, Insolvent; and, in May of the same year, *James Archibald Simpson* died, having appointed *Palmer, Brownrigg, Hobhouse* and *Francis Tipping Hall* his Executors in *India*, and *Trail* and two other Persons his Executors in *England*, and his Will was proved in *Calcutta*, by *Francis Tipping Hall* alone, soon after his death; and, in December 1821, his Will was proved by *Trail*, in the Prerogative Court of *Canterbury*. On the 18th of June 1822 Administration *de bonis non* of *George Augustus Simpson*, was granted, by the same Court, to *Mrs. Maitland* and, in 1823, *Trail* proved *William Hall's* Will in the same Court.

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In 1823 *Palmer & Co.* altered the Title of their Account with *George Augustus Simpson's* Estate, and headed it: "Trust for Mrs. *Maitland* and minor *Simpsons* in Account with Messrs. *Palmer & Co.*" In 1825, *Hobhouse* and *Brownrigg* retired from the Partnership, and by the Deeds of Dissolution which were executed on those occasions, they assigned their Interests in the Partnership Property to the continuing Partners, and the latter (one of whom was *Francis Tipping Hall*, the *Personal Representative of George Augustus Simpson in India*) took upon themselves and covenanted to pay all the Debts and Sums of Money due from the Partnership, and released *Brownrigg* and *Hobhouse* from all Demands respecting any matter relating to the Partnership. At different times afterwards, certain other Persons were admitted into the Partnership. In January 1830 *Palmer & Co.* became Bankrupts.

In 1831 the Plaintiff, *Samuel Twyford*, married one of the Daughters of *George Augustus Simpson*, who was only one year old at her Father's death; and, in March 1832, they filed the Bill in this Cause, against *Trail*, Sir *Charles Cockerell* and the other Partners in the House of *Cockerell, Trail & Co.*, and against *Brownrigg*, *Hobhouse*, *Francis Tipping Hall*, who was out of the Jurisdiction of the Court, Mrs. *Maitland* and her Husband, and certain formal Parties, alleging that *William Hall* and *James Archibald Simpson*, as the Executors of *George Augustus Simpson*, ought to have caused the Monies belonging to his Estate which were in the hands of *Palmer & Co.* in their lifetime, to be invested on proper Securities; and, that, as they had neglected to do so, the Amount of such Monies ought to be made good out of their Assets: that *Brownrigg*

and *Hobhouse*, during the times that they were Partners in the Firm of *Palmer & Co.*, were, together with the other Members of the Firm, indebted to *George Augustus Simpson's* Estate in the Sums belonging to his Estate which were in the hands of the Firm during those periods, and that they still continued so indebted; and that they *had notice, by the manner in which the Accounts relating to those Monies were entered in their Books*, and from the Accounts relating thereto which were from time to time sent to *Cockerell & Co.*, that the same were Trust Monies and subject to the Trusts of *George Augustus Simpson's Will*, and that such Monies were thereby directed to be, or otherwise ought to have been invested on Government Securities; and that they ought to have caused the same so to be invested; and that such Monies were suffered to remain in the hands of the Firm, by a Breach of Trust, of which they were aware, and in which they concurred, and that they became Trustees thereof for the Persons interested in *George Augustus Simpson's Estate*, and became, and still were responsible for the same. The Bill further alleged that *Trail*, after the death of *James Archibald Simpson*, and after having proved his Will, became the Personal Representative of *George Augustus Simpson*, and that the Letters of Administration granted to Mrs. *Maitland*, were void; and that *Trail*, as such Personal Representative, ought to have procured the Monies in the hands of *Palmer & Co.*, to be remitted to *England*; but that he neglected so to do, and permitted and sanctioned their retaining the same, and he thereby became and still was responsible for the same, or so much thereof as might be lost by the Insolvency of *Palmer & Co.* The Bill further charged that, in October 1828, *Palmer & Co.* remitted to *Trail* or to *Cockerell*, *Trail*

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& Co. a Bill of Exchange for 5,000*l.*, drawn by them upon *Cockerell, Trail & Co.*, on Account of *George Augustus Simpson's* Estate; and that they returned the Bill, unaccepted, to *Palmer & Co.* The Bill prayed that the usual Accounts might be taken of *George Augustus Simpson's* Estate possessed by his Personal Representatives, or which, without their default or neglect, might have been possessed by them, and that it might be declared that the personal Estates of *James Archibald Simpson* and *William Hall*, and, also, the Defendants *Trail, Francis Tipping Hall, Brownrigg* and *Hobhouse* were bound to make good the Monies belonging to *George Augustus Simpson's* Estate, which were left in the hands of and were due from the Firm, or successive Firms of *Palmer & Co.*; and that it might be also declared that *Cockerell & Co.* were bound to make good the Amount of the Monies received by them on account of *George Augustus Simpson's* Estate and of the Bill of Exchange which had been returned to *Palmer & Co.*

Trail, in his Answer, submitted, to the Judgment of the Court whether, by proving the Will of *James Archibald Simpson* in *England*, he became the Personal Representative of *George Augustus Simpson*.

Brownrigg and *Hobhouse*, in their Answers, said that the Monies belonging to *George Augustus Simpson's* Estate, were entered to the Debit of *Palmer & Co.* in account between them and the Estate, in their Books of Account, and, in all the Accounts furnished by them from time to time to his Executors, as Monies in the hands of *Palmer & Co.*, as *Bankers or Agents for the Executors*, and payable to their Order and under their control: and they said that their retirement from the

Partnership was well known to *George Augustus Simpson*'s Personal Representatives, who adopted the remaining Partners and also the succeeding Members of the Firm, as their Debtors in respect of the Monies belonging to *George Augustus Simpson*'s Estate: and they relied on the Releases executed to them on retiring from the Partnership, and on the Statute of Limitations.

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Mr. Rolfe, Mr. Jacob and Mr. Wigram for the Plaintiffs:

It was the duty of *George Augustus Simpson*'s Executors to call in and invest their Testator's Estate as directed by his Will; and, as they did not do so, but suffered it to remain in the House in which two of them were Partners, they were guilty of a Breach of Trust, and so also were all the Persons who were Partners in the Firm at the death of *George Augustus Simpson*. There was always in the Firm a Personal Representative of *George Augustus Simpson* who was guilty of a Breach of Trust. Although *Hobhouse* and *Brownrigg* did not become Partners in the House till after *George Augustus Simpson*'s death, they had constructive notice, at the least, from the manner in which the Accounts with his Estate were headed in the Books of the Firm, that there was a Trust Fund which they and their Partners were holding at their peril. And, in the Accounts which were sent to *England* from time to time during their continuance in the Partnership, they recognised the Fund as a Trust Fund. *Hobhouse* and *Brownrigg*, therefore, became Trustees: and, as they were Accessaries to the Breach of Trust, they became responsible for it equally with the Executors themselves. *Muck-*

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low v. Fuller(a), Ex parte Watson(b), Ex parte Heaton(c), Wilson v. Moore (d), Dickenson v. Lockyer(e), Smith v. Jameson(f), Gedge v. Traill(g), Walker v Symonds(h).



Palmer & Co. were not merely the Bankers of the Executors. It is the custom of *Indian Houses* to receive Monies as a permanent Investment: and the Monies belonging to *George Augustus Simpson's Estate*, were placed in the hands of *Palmer & Co.*, not as a mere temporary Deposit, but as an Investment or Loan; and the Firm dealt with the *Cestuisque Trust*, and not merely with the Executors.

The Statute of Limitations does not apply; on account of the Infancy of the *Cestuisque Trust*, and because the Partners in the House for the time being, continued to make Payments on account, and also because the Defendants were Parties to a Breach of Trust.

The Releases executed on the retirement of *Hobhouse* and *Brownrigg*, were executed to them for allowing the remaining Partners to continue in the same course of Breach of Trust. The *Cestuisque Trust* were no Parties to those Releases, and, therefore, their Claims were not affected by them. It is questionable whether even a payment to the Person legally entitled to receive the Money, would have absolved the Defendants, they knowing that he meant to be guilty of a Breach of Trust.

(a) Jac. 198.

(b) 2 V. & B. 414.

(c) Buck. 386.

(d) 1 M. & K. 126 & 337.

(e) 4 Ves. 36.

(f) 5 T. R. 601.

(g) 1 Russ. & Myl. 281, note.

(h) 3 Swans. 1.

Trail, by proving *James Archibald Simpson's* Will, became the Personal Representative of *George Augustus Simpson*. He knew, from the beginning, that the Testator's Assets had been misapplied ; and it was his duty to see that they were called in and invested. After he had proved the Will, he did write out to *Calcutta*, to say that the Property ought to be called in and invested ; but he afterwards let the matter drop until it was too late. *Trail*, therefore, is liable personally, as well as in respect of the Assets of *James Archibald Simpson* and *William Hall* which were received by him.

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Cockerell & Co. knew that the Monies which they received were Trust-monies ; and they are liable for what they received, and also for the amount of the Bill of Exchange which they returned.

The *Solicitor-General* and Mr. *Cockerell*, for the Defendant *Trail*, contended that Mrs. *Maitland*, and not *Trail*, was the Personal Representative, in *England*, of *George Augustus Simpson*.

Sir *E. Sugden* and Mr. *Walker* for the Defendants *Cockerell & Co.*

Mr. *Knight* and Mr. *Kindersley* for the Defendant *Brownrigg*.

Mr. *Sharpe* for the Defendant *Hobhouse*.

Mr. *Rennalls* for the other Defendants.

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The Cause having been placed in the Paper in order that the Question, whether *Trail* was the Personal Representative in *England* of *George Augustus Simpson*, might be again discussed, Mr. *Rolfe* addressed the Court upon that point. At the conclusion of his Argument,

The VICE-CHANCELLOR said :

I have often had occasion to consider this subject, particularly on questions regarding the Assignment of Terms of Years ; and I have always understood that, if a Person dies possessed of Chattels Real in the Province of *York* and also in the Province of *Canterbury*, the proof of the Will in one only of the two Provinces, does not enable the Executors to make a good Assignment of the Chattels Real which are in the other Province.

Supposing that, after Probate of *George Augustus Simpson's* Will had been granted in *India*, it had been thought necessary, on account of there being Assets of the deceased in the Province of *Canterbury*, to obtain Probate of his Will in that Province, I apprehend that the Probate in *India* would not have been conclusive upon the Prerogative Court of *Canterbury*, but that it would have been competent to that Court to hear the Next of Kin and refuse the Probate to the Executors, and grant Administration. It is quite evident that there might have been sufficient Evidence, in *India*, to induce the *Indian* Court to grant the Probate, and, at the same time, sufficient Evidence in this Country to make it right for the Prerogative Court of *Canterbury* to refuse the Probate and to grant Administration.

If a man makes *A.* his Executor, and then *A.* dies and appoints *B.* his Executor, and *B.* proves *A.'s* Will

in the Court in which *A.* had proved the Will of his Testator, the reason why *B.* is said to represent the original Testator, is that the Court itself has Jurisdiction over the original Will : and I apprehend that that Court, by reason of its being the Court which did grant Probate of the Will of the first Testator, would be able, itself, to entertain a Suit against the Executor of *A.*, for the Administration of the remaining Assets of the first Testator ; for every Executor who proves, comes under an obligation to be responsible, to the Court in which he does prove, for the Assets of the Estate which he represents.

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But, in this Case, it is not attempted to be said that *Trail* can be responsible through the *English* Probate obtained by *Maitland*, there being no connection whatever between him and *Maitland*. The only way to make *Trail* responsible in *England*, is by connecting him with the original Testator through *James Archibald Simpson*. Now, during the lifetime of *James Archibald Simpson*, no Suit could have been instituted against him, in the Prerogative Court, for the Administration of the Assets of the Testator ; and for this reason, namely, because the Prerogative Court had no Jurisdiction over the Will as against *James Archibald Simpson* ; for he never proved the Will in that Court ; but, on his death, Mr. *Trail* proved *his* Will in that Court. And I apprehend that it is quite a matter of course for the Ecclesiastical Court, under such circumstances, to grant Administration.

The question however is one of great importance, and, if the Parties wish it, the Opinion of a Court of Law must be taken upon it (i).

(i) See *Jernegan v. Baxter*, ante, Vol. 5, page 568.

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Mr. Rolfe having declined to take a Case,

His Honor, after stating the Facts of the Case, delivered Judgment as follows :

There is no doubt that it was the duty of *William Hall* and *James Archibald Simpson* to withdraw, from the House of *Palmer & Co.*, the Share belonging to *George Augustus Simpson*. They, however, suffered it to remain in the House, and their Assets, therefore, are responsible for the loss sustained in consequence : and, to the extent in which *Trail* has possessed Assets of *William Hall* or of *James Archibald Simpson*, he will be liable to make good that default.

But the Plaintiffs seek to make him, as well as Sir *Charles Cockerell* and his Partners, and the Defendants *Hobhouse* and *Brownrigg*, personally responsible. It has been argued that, by proving, in *England*, the Will of *James Archibald Simpson*, who had proved in *India* the Will of *George Augustus Simpson*, *Trail* became the Personal Representative of *George Augustus Simpson*, and that, therefore, it was his duty to withdraw *George Augustus Simpson's* Share from the House of *Palmer & Co.*, and that he is responsible for the loss arising from the non-performance of that duty.

I apprehend the Law clearly to be otherwise, and that, as *James Archibald Simpson* proved his Testator's Will in *India* only, *Trail* did not, by proving *James Archibald Simpson's* Will in *England*, become, and is not now the Personal Representative of *George Augustus Simpson*, either in *England* or in *India*. In order to make him the Representative of *George Augustus*

Simpson, it was necessary that he should prove the Will of his Testator in that Ecclesiastical Court wherein his Testator had proved the Will of *George Augustus Simpson*. But that he did not do. Therefore, he is not personally responsible, for the loss in question, as the Representative of *George Augustus Simpson*; and his voluntarily acting as the Agent, Trustee or Friend of *Mrs. Maitland* and her Children, or as one of the Partners of *Sir Charles Cockerell & Co.* (the only characters in which he did act) cannot make him personally liable. So far, therefore, as the Bill seeks to make him personally liable for the loss, it must be dismissed with Costs.

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With respect to *Sir Charles Cockerell & Co.*, they acted, merely, as the Agents and Correspondents of *Palmer & Co.*, and there is no pretence for charging them. Therefore, so far as the Bill seeks to charge them with the loss, it must also be dismissed with Costs.

As to the Defendants *Hobhouse* and *Brownrigg*, it is to be observed that they, in common with their Partners, did, by the consent of *James Archibald Simpson* during his life, and, after his death, by the consent of *Francis Tipping Hall*, who was the *Indian* Representative of *George Augustus Simpson*, merely act in the same manner as the House of *Palmer & Co.* had acted before they were admitted: and to assert that they must now be personally responsible, merely because, while they remained in the House, they allowed the Account with the Estate of *George Augustus Simpson* to subsist in the same manner as it had done before they became Partners, is to assert a proposition some-

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what new and rather alarming. Besides, when they retired from the Firm in 1825, they each received a Release from *Francis Tipping Hall*, the Executor in *India* of *George Augustus Simpson*, of all Demands in respect of any Matter relating to their Copartnership. I am of Opinion, therefore, that, as to them, the Bill must be dismissed with Costs.

The Bill also prays for a Declaration that *Trail* and his Partners are responsible for the Amount of the Monies received by them on Account of the Estate of *George Augustus Simpson*, and for the Amount of the Bill of Exchange returned by them. It appears that *Trail*, by a Letter of the 10th of January 1827, had directed *Palmer & Co.* to invest the Estate of *George Augustus Simpson* in Government Securities in *India*. In answer they sent a Letter of the 5th of June 1827, saying that, on the 31st of December next, they would invest 100,000 Sicca Rupees, and that a like Sum should be invested in December 1828, and so on, yearly, till the whole was completed. But, on the 9th of February 1828, they wrote to *Trail*, stating that his Instructions of the 10th of January 1827 would be sufficiently and most clearly met by periodical Remittances instead of Investments, and that they, accordingly, had elected the alternative of Remittance, and sent a Draft for 5,000/. on themselves, and six months hence they would send an equal Sum, and so on every six months until the whole Balance should have been absorbed. The receipt of that Letter and of the Draft, was acknowledged, by *Cockerell & Co.*, in a Letter of the 21st of July 1828, and *Trail* also wrote to *Palmer & Co.* a Letter of the same date, requesting they would refrain from sending home any further Sum on Account of the

Estate, repeating his Instructions of the 10th of January 1827, and desiring that they would carry his Instructions into effect according to the tenor of their Letter to him of the 5th of June last year. *Palmer & Co.*, however, sent to *Trail* a Letter of the 1st of October 1828, enclosing a Bill on *Cockerell & Co.* in favour of *Trail*, for the Cost of which they said they debited the Trust for Mrs. *Maitland* and the minor *Simpsons*. *Cockerell & Co.*, under *Trail*'s Directions, returned that Bill in a Letter dated the 21st of April 1829, and, in two Letters, each dated the 2d of January 1830, one to *Trail* the other to *Cockerell & Co.*, *Palmer & Co.* acknowledged the receipt of the returned Bill, and stated that the value of it, with Interest, had been written back to the Trust Account, and that Mr. *Trail*'s Instructions regarding the Investment of the Trust Funds, should be carried into effect. In respect of this second Bill the Plaintiffs ask for relief.

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So far as *Trail*, or *Cockerell & Co.* received any of the Assets of *George Augustus Simpson*, they are liable to a common Account. But, with respect to this second Bill, it does not, in the first place, appear that *Cockerell & Co.* had Assets of *Palmer & Co.* to answer it; and, if they had, *Trail* was under no obligation to receive Money which he had expressly desired should not be sent to him; and, in the return of the Bill, *Cockerell & Co.* merely acted as *Trail*'s Agents. In respect, therefore, of this returned Bill, no Case for Relief is established; and the Bill must be dismissed as against *Trail* and *Cockerell & Co.* with Costs.

The result, upon the whole, is that Relief can only be given in the shape of common Accounts; and, so far as

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the Plaintiffs do not choose to have the common Accounts against any of the Defendants who are accountable, the Bill must be dismissed with Costs.

The Decree dismissed the Bill, with Costs, as against *Cockerell & Co.* and *Brownrigg* and *Hobhouse*, and as against *Trail*, so far as it sought to make him personally responsible as the alleged Personal Representative of *George Augustus Simpson*, or sought any Relief against him as one of the Partners in the Firm of *Cockerell & Co.*; and declared that it was the duty of *William Hall* and *James Archibald Simpson* to withdraw, from the House of *Palmer & Co.*, the Monies belonging to *George Augustus Simpson's* Estate; and that their Estates were responsible for the loss occasioned by their neglect; and referred it to the *Master* to ascertain the Amount of such loss, with liberty to state Special Circumstances; and also to take an Account of the Estates of *William Hall* and *James Archibald Simpson* come to the hands of *Trail*, their legal Personal Representative in *England*, and to inquire what Sums belonging to the Estate of *George Augustus Simpson*, had come to *Trail's* hands and under what Circumstances, and how the same had been applied; and to inquire and state the Amount of the Monies belonging to the Estate of *George Augustus Simpson*, which were in the hands or due from *Palmer & Co.* when they failed, and what Dividends had become payable in respect thereof and by whom received, and how applied.

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A. P. FORTUNATO, a Merchant at *Liverpool*, was in the habit of making Consignments of Goods to be sold on his Account, to *A. Rego*, his Agent at *Bahia* in *South America*, and of drawing Bills of Exchange, in respect of them, upon *Rego*. In order that the Bills might be negotiated in this Country, *Fortunato* had, for several years, procured them to be indorsed by the Plaintiff, who was his Agent in London, on the express understanding that the Bills should be drawn with respect to actual Consignments, made to *Rego*, of sufficient value to cover the Amount and also the Expenses of Commission and Brokerage for negotiating them.

Between the 20th of November 1828 and the 14th of March 1829, *Fortunato* made several Consignments, to *Rego*, to the amount of 3,800 *l.* The Plaintiff was made acquainted with all those Consignments, and, by *Fortunato's* desire, effected Insurances on them. Between the 29th of November 1828 and the 16th of March 1829, *Fortunato* drew, in respect of the Consignments, seven Bills of Exchange, amounting to 3,800 *l.* upon *Rego*, and the Plaintiff, on the faith of the Consignments, indorsed and negotiated them, and credited *Fortunato* with the amount. The Bills were presented to *Rego* for acceptance, and were dishonoured; but they were afterwards accepted, under Protest, by one *Vogeler*, the Plaintiff's Agent and Correspondent at *Bahia*, for his honour. On the 23d of March 1829, the Plaintiff, who had received notice of the dishonour of two of the Bills, wrote to *Fortunato* as follows:

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19th July.

*Bankrupt.
Order and
Disposition.
Lien.*

A. a Merchant in *Liverpool*, being indebted to *B.* a Merchant in *London*, on the 11th of April, sent, at *B.'s* request, a written Order to *C.* his Agent in *Bahia*, to deliver to *B.'s* Agent there, all the Goods belonging to *A.* in his, *C.'s* hands. On the 23d of May, *A.* committed an Act of Bankruptcy, on which a Commission issued. On account of the distance of *Bahia* from *England*, the Order did not reach *C.*, till after the 23d of May. Held that *B.* had a Lien on the Goods for his Debt.

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"SIR,—It is with the greatest concern we have now to inform you that we have, this day, received advices, from *Bahia*, that Mr. *Andre da Cunha Rego* had refused to accept your Drafts on him of the 29th of November, for 500 *l.* and 400 *l.*, which intelligence, as you may well conceive, has caused us no small degree of surprise and mortification, particularly as we cannot but be apprehensive that the same unlooked for fate may likewise await your subsequent Drafts on him. We have, therefore, most earnestly to request that you will not lose one moment in putting Mr. *Rego* in such a situation as to enable him to pay your Drafts, and that you will, also, resort to the necessary means to furnish us with Funds sufficient to reimburse us for the amount of any of your Drafts that may come back to us protested for nonpayment, whenever you are aware of such being the case."

On the 27th of March 1829 the Plaintiff received from *Fortunato* a Letter dated the 25th of that month, which was, partly, as follows: "It grieves me most bitterly, the object of your favour of the 23d, and at a time when I am quite unprepared to act as it is both my wish and my duty, therefore I have to request of you to send back the protested Drafts to your Agent at *Bahia* to have them accepted by Mr. *Rego*, allowing him an extension of time to liquidate; as, by this mode, you only will incur the inconvenience of a delay, and I will give instructions to Mr. *Rego* to settle with your Agent as the demands arise from the said Bills."

On the 4th of April 1829, the Plaintiff, who knew that *Rego* then had, in his hands, property belonging to *Fortunato*, to the invoice amount of 3,625 *l.* wrote to *For-*

tuato as follows: "We were duly favoured with your esteemed Letter of the 25th ult. and, in reply thereto, we beg leave to observe that the Bills Mr. A. C. *Rego* of *Bahia* refused to accept, have not yet been returned to us, as it would have been quite irregular to have returned them merely for want of acceptance; but, in case of nonpayment on the days on which they become due, they are sure to be sent back with the necessary Protests, as it is quite impossible for us or our Agent to grant any extension of time as we are not the holders of the Bills, with whom alone rests the power of granting such an accommodation. As Indorsees of the Bills, they will, of course, come back upon us first; however, we most fervently hope that such an unpleasant event will not take place, and that Mr. *Rego* will duly pay them. We have too high an opinion of your honour to suppose for a moment that you would have drawn these Bills without having the means necessary for their discharge in the hands of Mr. *Rego*, and, therefore, we have most earnestly to request that you will write to Mr. *Rego*, by the first vessel, with orders that, *in case he does not pay your Drafts, he will immediately hand over such Property as he may have of yours, of an equivalent value to the Bills not paid by him, to our Agent, Mr. J. F. Vogeler of Bahia*, who we have requested to pay the Bills for our honour. Trusting that you will do everything to protect our interest in this affair, we are, &c."

In answer to that Letter, *Fortunato* wrote to the Plaintiff a Letter of the 9th of April 1829, which was as follows: "I was duly favoured with your esteemed Letter of the 4th instant, the contents of which I duly observe, and, agreeable to your injunctions, I will write

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to Mr. A. C. Rego, per brig *Wavertree*, to sail on the 12th of this month, directing him to hand over, to Mr. J. F. Vogeler, *Property of mine in his hands*, to cover the amount of Bills that eventually may not be paid; I say, eventually, because I do still hope that some of them will be accepted; for the cause of Mr. Rego not having done so, was the actual impossibility of realizing and collecting Debts. I beg to assure you that I will do all that is due from me to secure your Property, and you shall not be sufferers in the least on account of this unfortunate transaction beyond some delay."

When *Fortunato* wrote the last Letter, he knew that there was Property belonging to him, in the hands of *Rego*, to the before-mentioned amount. The Plaintiff, relying upon the promise contained in the last Letter, did not communicate, either to *Rego* or to *Vogeler*, the contents of the Letters which had passed between him and *Fortunato*.

On the 11th of April 1829, *Fortunato*, according to his promise, sent to *Rego* the following Letter: "Dear Sir, I have engaged and made promise to Messrs. A. Burn & Co., that you should pass into the hands of their Agent in your City, Mr. J. F. Vogeler, all the Property which might exist in your hands for my account. You will arrange with that gentleman the mode in which this order may be carried into effect, with this understanding that it is essential that the whole be done with perfect secrecy, for which I shall consider myself very much obliged to you. It appears to me that the best plan would be, for you to pay in the liquidated amounts as fast as the same are being received." This Letter was received by *Rego*, about the end of May 1829, at

which time he had, in his hands, goods belonging to *Fortunato*, to the amount before mentioned.

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On the 23d of June 1829, a Commission of Bankruptcy issued, against *Fortunato*, on an Act of Bankruptcy committed on the 23d of May preceding, and the Defendants were chosen his Assignees.

On the 31st of July 1829, the Plaintiff received, from *Rego*, a Letter dated the 11th of June, which was as follows: "The most essential reason which obliged me to refuse acceptance to the Bills which Mr. *Fortunato* drew upon me on the 29th of November and subsequent months, was the absolute stagnation of a great part of the Goods which he consigned to me, and of which there still exists great part in my possession, which I will deliver to Mr. J. F. Vogeler, in consequence of the Order to do so, which I have received from him, Mr. *Fortunato*, which delivery I intend effecting by the end of the current month."

On the 30th of June 1829, (at which time, neither *Rego* nor *Vogeler* had any notice of the Act of Bankruptcy) the former delivered, to the latter, Goods belonging to *Fortunato*, to the amount before mentioned; and, on the 15th of July, *Rego* wrote to the Plaintiff as follows:

"SIR,—The present has for its sole object, the informing you that, on the 30th ultimo, I placed at the disposal of Mr. J. F. Vogeler, 3,625 l. in Goods belonging to Mr. *Fortunato* of *Liverpool*. Through want of calculation, without doubt, and never with any intent of prejudicing you, it was that this Friend continued drawing successively against Remittances which he made, with-

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out, perhaps, counting the constant stagnation occurring with Goods, and the difficulties which offer in realizing their result. These which I have set forth, and no other, being the motives which operated with me in not accepting the last Drafts of said Friend for 3,800 l.; which amount, compared with that I deliver in Goods on hand, shows, evidently, that it was not with sinister views Mr. *Fortunato* charged you with negotiating his Bills, but by the occurrence of the circumstances I have mentioned."

Vogeler sold the Goods at *Bahia*, and transmitted the net Proceeds, amounting to 2,049 l. to the Plaintiff.

In 1831, the Defendants brought an Action against the Plaintiff, and obtained a verdict for the 2,049 l. subject to the Opinion of the Court on a Special Case. The Case was argued, and Judgment was given against the Plaintiff (a), and that Judgment was affirmed in The Exchequer Chamber.

The Bill, after stating as above, charged that though the Defendants might be entitled, at Law, to recover the 2,049 l., in consequence of the Goods not having been delivered to *Vogeler* until after the issuing of the Commission, yet the Plaintiff was entitled, in Equity, to the Proceeds of the Goods, and that the Defendants had no right to any part of the Property without previously satisfying thereout the Plaintiff's demands in respect of the Bills: that the Plaintiff was informed of the writing and sending of the Letter of the 11th of April, and that the writing and sending of it was part of the arrangement alluded to in the Letters of the 4th and 9th of April: that it was impossible that *Rego* could have been informed, previously to the Act

(a) See 4 B. & Adol. 382.

of Bankruptcy, of the Letters of the 9th and 11th of April, or that the Plaintiff had any claim to the Property, because a Letter sent from *England* on the 11th of April, could not possibly reach *Bahia* until after the 23d of May. The Bill prayed for a declaration that the Plaintiff was entitled to the Goods, and to retain the 2,049 £, for the purpose of the same being applied to satisfy the amount of the Bills, and for an Injunction to restrain the Defendants from taking out Execution in the Action.

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The Defendants put in a general Demurrer.

The *Solicitor-General* (with whom was Mr. *Spence*)
in support of the Demurrer:

The Parties have no right in this Court; for there is no difference between the question at Law and in Equity. The Goods were not delivered, by *Vogeler* to *Rego*, till after the Act of Bankruptcy, nor, indeed, till after the issuing of the Commission. In the Letter of the 9th of April, no specific Property is alluded to. That Letter shows that the Bankrupt had no intention of immediately passing the Property so as to give dominion over it to another; but merely that he intended that the Property should pass in a certain event, which could not be then ascertained. The Letter of the 11th of April is liable to the same Objections: it relates, not to a transfer of Goods, but to payment of a Balance. The Promise mentioned in that Letter, was not applicable to any particular Goods: it was merely a Promise to pay what was due to the Plaintiff out of Money due, to the Bankrupt, from another Person. No liability was created between the Party who owed the Money and the Party to whom the Promise was made:

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for no communication took place between them. At all events, nothing took place to change the Property in the Goods, prior to the Act of Bankruptcy; and whatever passed after that, is of no importance. *Freemoult v. Dedire* (b), *Williams v. Lucas* (c).

Sir *E. Sugden* and Mr. *G. Richards* in support of the Bill:

The Bills were drawn against the Goods which had been sent to *Bahia*, and they were to be paid out of the Proceeds of those Goods. The Letters clearly specify the Goods which *Rego* was to deliver to *Vogeler*. In the Letter of the 4th of April, the Plaintiff requested the Bankrupts to write to *Rego*, ordering him, in case he did not pay the Bills, to hand over to *Vogeler* such Property of the Bankrupt as he, *Rego*, might have of an equivalent Value to the Bills not paid. In the Answer to that Letter, the Bankrupt said that he would write to *Rego*, directing him to hand over to *Vogeler*, Property belonging to the Bankrupt, in his hands, to cover the Amount of the Bills: and, accordingly, on the 11th of April the Bankrupt did write to *Rego* directing him to hand over, to *Vogeler*, all the Property in his hands belonging to the Bankrupt. Therefore, the Letters gave the Plaintiff an equitable Lien on the Goods in the hands of *Rego*. When the Letter of the 11th of April was sent off, the Goods no longer remained in the order and disposition of the Bankrupt or his Agent, *with the consent of the true Owner*. No delay took place in dispatching that Letter; and, on account of the distance between *Bahia* and this country, it was impossible that information of the transfer of the Goods, could arrive at *Bahia*, before the Act of Bank-

(b) 1 P. W. 429.

(c) Ibid. 430, note.

ruptcy was committed, and, therefore, it is of no importance that the Letter did not reach *Rego* till after the Act of Bankruptcy.

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All that the Court of Law decided was that, as the Proceeds of the Goods might be more than sufficient to satisfy the Plaintiff's demand, in which case the Creditors would derive *some* benefit from the Goods, therefore, the Property in them passed to the Assignees. It passed, however, subject to the Plaintiff's Equitable Lien (*d*).

The *Solicitor-General*, in reply :

The Letter of the 11th of April, was a mere Authority to do an act, and, before it arrived, the Property had passed away from the Party who had given the Authority. It was a countermandable Authority, and it was countermanded by the Bankruptcy.

Another Objection is that, if there was any Contract between the Plaintiff and the Bankrupt, it was merely a Contract to assign a Debt. By the instructions sent to *Rego*, he was to deal with the Money-balance, and not with the Goods: the Plaintiff was not to have the Goods at all. The Bills were not drawn against any particular Consignment, and they do not correspond, in Amount, with, nor have they any reference whatever to, the Funds out of which, it is said, they were to be paid. The Contract was never acted upon by any com-

(*d*) In the course of the Argument it was observed that, in the Report of the Judgment in the Case at Law, the word *Equitable* was used, where the word *Beneficial* would have been more proper.

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munication between the Person who owed the Money and the Person to whom it was to be paid. The Property in a Debt is not changed, until the Debtor is told to whom he is to pay the Debt. Here the Bankruptcy intervened and defeated the Assignment.

The VICE-CHANCELLOR :

The question, in this Case, is what is the true Construction of the Letters of the 4th, 9th & 11th of April.

The facts of the Case, as I understand them, are these : The Plaintiff knew the course of dealing between *Fortunato* and *Rego*, which was that *Fortunato* made Consignments of Goods to *Rego*, for sale on his account, and drew Bills on him, not on the credit of each Consignment, but on the credit of the Goods generally : and the Plaintiff indorsed and negotiated the Bills for *Fortunato*, and gave him credit for the Amount. With respect to the Bills which were drawn between the 29th of November 1828 and the 16th of March 1829, it appears that *Fortunato*, having, about the 20th of November 1828, made a Consignment of Goods, to *Rego*, of the value of 1,450 *l.*, and, on the 14th of January 1829, two further Consignments amounting to 850 *l.* and 650 *l.* ; and, on the 14th March, another Consignment to the amount of 850 *l.*, drew, on the 29th of November 1828, two Bills on *Rego*, one for 400 *l.* and the other for 500 *l.* and, on the 16th of January 1829, two more Bills for 500 *l.* each, and, on the 14th and 25th of February and 16th of March three other Bills for 700 *l.*, 700 *l.* and 500 *l.* All these Bills were made payable to the order of the Plaintiff sixty days after sight, and were remitted, by *Fortunato*, to the Plaintiff,

who indorsed and negotiated them, and gave *Fortunato* credit for the Amount. The Bills, on their being presented to *Rego* for acceptance, were dishonoured ; but they were afterwards accepted, under protest, by *Vogeler*, for the honour of the Plaintiff.

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In that state of circumstances, the Plaintiff, who had received notice of the dishonour of two of the Bills, wrote, to *Fortunato*, the Letter of the 4th of April, in which he says : “ We have most earnestly to request that you will write to Mr. *Rego*, by the first vessel, with orders that, in case he does not pay your Drafts, he will immediately hand over, such Property as he may have of yours of an equivalent value to the Bills not paid by him, to our Agent, Mr. *J. F. Vogeler* of *Bahia*, who we have requested to pay the Bills for our honour.” The natural import of that Letter, was that all the Property (if necessary) which *Rego* had in his possession, belonging to *Fortunato*, should be handed over to *Vogeler* as a protection against the Bills which *Rego* might refuse to pay. *Fortunato*’s answer to that Letter was as follows : “ Agreeable to your injunction, I will write to Mr. *A. C. Rego*, per brig *Wavertree*, to sail on the 12th of this month, directing him to hand over to Mr. *J. F. Vogeler*, Property of mine in his hands, to cover the amount of Bills that eventually may not be paid.” I admit that there is ground for the observation that was made, by The *Solicitor-General*, on the word, *Property*, in this Letter, that it is not sufficiently definite, as it might mean all the Property, if all was necessary, or part of the Property, if part only was necessary. But, when I look at the Letter of the 11th of April, I find that *Fortunato* wrote to *Rego* saying : “ I have engaged and made promise, to Messrs. *Burn & Co.*, that you shall pass into the hands of their Agent in your

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City, Mr. J. F. *Vogeler*, all the Property that might exist in your hands for my account." Therefore, *Fortunato*, in this Letter, puts a construction on the general word *Property* which he had used in his previous Letter, and says that the promise which he had made to the Plaintiff, was that all the Property which might exist in the hands of *Rego* on his account, should be handed over to *Vogeler*. In the subsequent part of the Letter, he says : " You will arrange, with that gentleman, the mode in which this order may be carried into effect: it appears to me that the best plan would be for you to pay in the liquidated amounts as fast as the same are being received." What he meant by this passage was, not to give a positive direction to *Rego*, to hand over to *Vogeler* the proceeds of the Goods and not the Goods themselves; but, having communicated his promise to *Rego*, to leave it to him to determine, in conjunction with *Vogeler*, on the best mode of carrying that promise into effect, at the same time suggesting what, as he thought, might be the best mode.

I am therefore of Opinion that the Letters do amount to a Contract in Equity, by *Fortunato*, that the whole of the Property existing in the hands of *Rego* on his account, should be an Indemnity to the Plaintiff for the Loss he had sustained in paying the Bills: and, unless the proposition that the whole of the Property was subjected to make good the Loss, is inconsistent with what has been decided at Law, this Demurrer must be overruled.*

Demurrer overruled.

* Affirmed by The Lords Commissioners.

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1834:
21st July.

ON the 28th of May 1833, the Defendant agreed to purchase of the Plaintiff certain Coal Mines in *Staffordshire*; but afterwards refused to complete his purchase on the ground that the Plaintiff could not make a good Title; upon which the Bill was filed, in June 1834, to compel a Specific Performance of the Contract.

*Vendor and
Purchaser.
Title.
Bankrupt.*

The grounds on which the Defendant objected to the Title, were stated in the Bill, and were as follows :

By Lease and Release of the 11th and 12th of April 1828, the Release being made between *Robt. Bucknall* of the first part, *John Bill* and *Augustus Williams* (Trustees appointed on behalf of the Creditors of *Bucknall* for the purposes thereafter mentioned) of the second part, and the several Creditors of *Bucknall* who had executed or should, thereafter, execute the Release, of the third part: after reciting that *Bucknall* was entitled to the Freehold and Leasehold Estates thereafter conveyed, (including the Mines agreed to be purchased,) and to certain Monies due to him from his late Partnership with *Andrew Stevenson*, and that he was indebted, to the several persons mentioned in the Schedule to the Release, in the Sums set opposite their respective names, and that, being unable to pay the whole amount thereof, he had agreed to convey and assign his aforesaid Real and Personal Property, to *Bill* and *Williams*, in Trust to pay and satisfy the same, in manner thereafter

In 1828 *A.* a Trader, conveyed his Estates and certain Monies due to him, which were, substantially, the whole of his Property, to Trustees in Trust to sell &c., and pay his Creditors. In 1830 the Trustees sold part of the Estates to *B.* and *A.* joined with the Trustees in the Conveyance to *B.* In 1833 *B.* sold the purchased Premises to *D.* who objected to the Title, on the ground that the Conveyance of 1828 was an Act of Bankruptcy. No Commission, however, had issued against *A.* Held that

the Conveyance to *B.* was protected by the 86th sect. of the Bankrupt Act.

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expressed: *Bucknall* conveyed and assigned the Estates and Monies, and all other his Real Estate, to *Bill* and *Williams*, their Heirs &c. in Trust to sell the Estates: and it was declared that the Receipts of the Trustees should be good discharges for the Purchase-monies; and that they should apply the net Monies to arise by such Sales, in satisfaction of the Debts of the several Creditors who had executed, or should, thereafter, execute the Release, ratably according to their Debts, and, if there should be any Surplus, the same was to be in Trust for *Bucknall*, his Executors &c.: and it was provided that, in case any Creditor whose Debt amounted to 300 *l.*, or any of such Creditors whose Debts, in the whole, amounted to 600 *l.*, should not have executed or otherwise acceded to the Release, within Six calendar months next ensuing the date thereof, if resident in the *United Kingdom*, or within Twelve calendar months, if resident elsewhere, then the Release, so far as the same should not have been carried into effect, but without prejudice thereto as far as the same might have been carried into effect, and subject and without prejudice to any Sale, Mortgage or other disposition of the Premises, should be null and void; and that, in such case, the Monies (if any) which should have been received by all or any of the Creditors, should be repaid to *Bucknall*, his Executors &c.

The Release was executed by *Bucknall*, *Bill* and *Williams*, and by all the Creditors mentioned in the Schedule, except one whose Debt amounted to 640 *l.*, and except also several Creditors for sums under 100 *l.* each, and not exceeding 154 *l.* in the whole.

By Lease and Release of the 24th and 25th of Octo-

ber 1830, the Release being made between certain Persons who were Trustees of Terms, of the first and second parts, *Bill* and *Williams* of the third part, *Bucknall* of the fourth part, and the Plaintiff of the fifth part, after reciting (amongst other things) the before-mentioned Deeds, and that *Bill* and *Williams*, in pursuance and performance of the Trusts in them reposed by the Release of the 12th of April 1828, had agreed, with the Plaintiff, for the Sale to him of the Mines and certain other Parts of *Bucknall's* Estates: It was witnessed that, in pursuance of such Agreement, and, in consideration of the Sum therein-mentioned to have been paid, by the Plaintiff, to *Bill* and *Williams*, with the privity and consent of *Bucknall*, and of Ten Shillings paid to *Bucknall* by the Plaintiff, *Bill* and *Williams*, in pursuance of the Trusts of the Release of 1828, and with the privity and consent of *Bucknall*, did bargain, sell and release, and *Bucknall* did grant, release and confirm, to the Plaintiff and his Heirs, the Mines and other Hereditaments so agreed to be sold to the Plaintiff: To hold the same unto and to the Use of the Plaintiff, his Heirs and Assigns: and *Bucknall* entered into the usual Covenants for Title.

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At and previous to the execution of the Indentures of 1828, *Bucknall* was a Trader within the Bankrupt Laws; and the Estates and Monies therein comprised, constituted, substantially, all his Property: And, therefore, the Defendant contended that, by executing those Indentures, he committed an Act of Bankruptcy; and, consequently, that the Plaintiff's Title to the Mines was not good.*

* According to the decision in *Dutton v. Morrison*, 17 Ves. 193, the proviso in the Release of 1828, did not prevent its being an Act of Bankruptcy.

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Sir *E. Sugden* and Mr. *Purvis* for the Plaintiff.

The 86th Section of the Bankrupt Act (6 Geo. 4. c. 16.) enacts : " That no Purchase from any Bankrupt *bonâ fide* and for valuable Consideration, where the Purchaser had notice, at the time of such Purchase, of an Act of Bankruptcy by such Bankrupt committed, shall be impeached by reason thereof, unless the Commission against such Bankrupt shall have been sued out within 12 calendar months after such Act of Bankruptcy." So that, if *Bucknall* committed an Act of Bankruptcy by executing the Deeds of 1828, the Plaintiff is protected, by that Section, from the consequences ; for *Bucknall* joined in the Conveyance to the Plaintiff, which was executed in 1830, and no Commission has ever issued against him. This Case is within the words as well as the spirit of that Section of the Act ; and, if the Conveyance to the Plaintiff was not good as respects the Trustees, it was good as respects *Bucknall*.

Mr. *William Russell** and Mr. *Cooper*, for the Defendant.

The fourth Section of the Bankrupt Act enacts : " That where any such Trader shall, after this Act shall have come into effect, execute any Conveyance or Assignment, by Deed, to a Trustee or Trustees, of all his

* The Property the subject of the Suit, had been purchased by the Defendant, the Secretary of the Duchy of Lancaster, on behalf of the Duchy, and Mr. *W. Russell* appeared as Attorney-General, and Mr. *Cooper* as Serjeant of the Duchy. As the Suit related to Duchy Property, Mr. *W. Russell*, claimed precedence over The King's Counsel ; but the Claim being resisted, he did not press it.

Estate and Effects for the benefit of all the Creditors of such Trader, the Execution of such Deed shall not be deemed an Act of Bankruptcy, unless a Commission issue against such Trader within six calendar months from the Execution thereof by such Trader: *Provided that* such Deed shall be executed by every such Trustee within 15 days after the Execution thereof by the said Trader, and that the Execution by such Trader and by every such Trustee be attested by an Attorney or Solicitor; and that Notice be given within two months after the Execution thereof by such Trader, in case such Trader reside in *London* or within 40 miles thereof, in the *London Gazette* and also in two *London* daily Newspapers; and, in case such Trader does not reside within 40 miles of *London*, then in the *London Gazette* and also in one *London* daily Newspaper and one Provincial Newspaper published near to such Trader's residence: and such Notice shall contain the Date and Execution of such Deed, and the Name and Place of Abode respectively of every such Trustee and of such Attorney or Solicitor." The Conveyance by *Bucknall* to the Trustees, was therefore a clear Act of Bankruptcy.

The Plaintiff's Purchase, was not a Purchase within the 86th Section of the Act; for it was not a Purchase from *Bucknall*, but from the Trustees. The Consideration was received by them, and not by *Bucknall*. If it had been a Conveyance by him, it would have been a nullity. He had nothing to convey: neither the Legal nor the Equitable Interest was vested in him; and, consequently, the Plaintiff's Purchase could not have been a Purchase from *Bucknall*, *bonâ fide* and for valuable consideration. The spirit and intention of the Act

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would be violated, by adopting the construction contended for. The object of the 86th Section was to protect Purchasers from collateral Acts of Bankruptcy, and not to confirm Titles originating in Acts of Bankruptcy. It is impossible that the Act of Bankruptcy contemplated in the 86th Section, can be the Act of Bankruptcy specified in the 4th Section. When we look at that Section and the 14th Section of the 21st James 1st, c. 19, and contrast them with the 86th Section of the 6th Geo. 4th, it is impossible to contend that the Conveyance to the Plaintiff can be protected by that Section. The Deeds of 1830 recalled into existence the Deeds of 1828, and a new Act of Bankruptcy, evidenced by the Trustees receiving the Money, was then committed, and, as often as the Parties act upon that Deed, a new Act of Bankruptcy will be committed.

There is no Decision precisely in point, but *Bevan v. Nunn*(e) is an analogous Case.

The VICE-CHANCELLOR :

The Title appears to me to be good.

The Decision in the Case in the Court of Common Pleas is quite right; because it is manifest that the 81st Section points to an Act of Bankruptcy prior to and independent of the Act itself which is called in question. But, in that Case, the Act which was called in question, was the very Act of Bankruptcy; and, therefore, that Case was rightly decided.

It must, I think, have been the intention of the Legis-

(c) 9 Bing. 107.

lature to protect such a transaction as this is. I feel very much the force of Mr. *Cooper's* observation, namely, that if you can say that the Conveyance to the Purchaser himself, was an Act of Bankruptcy, then it would not be within the Protection of the 86th Section. But the question is, looking at the circumstances of this Case, whether you can say that the Conveyance to the Purchaser, was an Act of Bankruptcy.

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Now that the Deeds which were executed in the year 1828 were an Act of Bankruptcy, is not denied ; and it is quite clear that the Parties meant to act upon the footing of those Deeds ; and it is with reference to the form of those Deeds and to what was supposed to be the substance of them, that the Conveyance of 1830 was made. The Purchaser then has the benefit of *Bucknall's* joining ; and the Purchase was, in point of substance, a Purchase from him ; because he had conveyed to Trustees to execute a purpose beneficial to himself as well as to his Creditors : and I do not agree with what Mr. *W. Russell* said, namely, that *Bucknall* had no interest ; because, supposing that these Deeds were not impeachable on the ground of Bankruptcy, he might, at any time, upon payment to his Creditors of the Amount of their Debts ; have had a Conveyance of the Lands which were comprised in the Deeds of 1828 : they were, in fact, redeemable by him upon paying to the Creditors the Amount of their Debts. Then, in the year 1830, the Trustees, with the consent and with the actual concurrence of *Bucknall*, make a Conveyance to the Purchaser. This, therefore, was, in substance, an independent transaction of Conveyance by *Bucknall* to the Purchaser, he, the Purchaser, necessarily having Notice of the prior Act of Bankruptcy

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committed in 1828; and, as there has been no Case brought forward to the contrary, my Opinion is that this is a Case in which the Purchaser would be completely protected.

Declare the Title good, and Decree a Specific Performance of the Agreement.

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25th July.

OVEREND v. GURNEY.

Will.
Construction.
Legacy.

Testator gave a Real Estate and a Sum of Stock, to *A.* for her life, and, after her death, to his Brother, absolutely: and

he gave Legacies, which he directed to be paid as soon as convenient after his death, to his Nephews and Nieces, and the Residue of his property, to his Brother absolutely. The Brother having died, the Testator, by a Codicil reciting that fact and that, thereby, the Devises and Bequests to his Brother had lapsed, gave an Annuity to his Brother's Widow, and directed his Trustees to pay the Income of the Residue of his Personal Estate to *A.* for life, and gave to her all his Real Estates for life, and, after her death, to his Trustees in Trust to sell, and the Proceeds to fall into his Personal Estate: he then gave 10,000*l.* to each of his Nieces, in addition to the Legacies given to them by the Will, and directed that that Sum for each of them, should be held by his Trustees for their separate Use: and he gave all the clear Residue of his Estate, (after providing for the before-mentioned Legacies and also those given by his Will,) to his Nephews. Held that the Legacies given to the Nieces by the Codicil, were not payable till after *A.*'s death.

JOHN OVEREND, the Plaintiff's late Husband, by his Will dated the 25th of July 1829, gave his Mansion-house and Lands at *Chitt's Hill, Tottenham*, and also 50,000*l.* Consols, to his Brother *Hall Overend* and three other Persons, their Heirs, Executors &c. in Trust for the Plaintiff, then *Mary Kitching*, for her separate Use for life, and, after her death, for *Hall Overend*, his Heirs &c.: and he gave, to the

Plaintiff, all his Furniture, Plate, China and other Effects, (except Monies or Securities for Money) in and about his Premises at *Chitt's Hill*, for her own Use absolutely: and he gave 5,000 *l.* to each of his Brother's three Sons; and, to the Trustees, 20,000 *l.*, in Trust for the separate Use of his Brother's four Daughters, for their lives, and, after their deaths, for their Children: and he gave an Annuity of 50 *l.* to *Betty Ellison*, for her life, and, after her death, to her Husband, and directed that, after the death of the Survivor of them, the Funds set apart for payment of the Annuity, should become part of his Residuary Estate: he then gave several Legacies, and directed that all the Legacies thereinbefore given should be paid or invested as soon as might be after his death: and all the rest and residue of his Estate and Effects whatsoever and wheresoever, and of what nature or kind soever the same might be, he gave to his Brother, his Heirs, Executors and Administrators, according to the respective nature and quality thereof; and he appointed his Brother and the three other Trustees, his Executors.

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The Testator made two Codicils to his Will. By the second Codicil, he revoked the first, and also the Legacies given by his Will to his Household Servants, and gave them other Legacies in lieu thereof; and he gave to his Friend, *John Winstone*, 1,000 *l.*, and directed that the Legacies thereby given to his Servants, should be paid clear of all Duty and Deductions whatsoever.

Hall Overend having died after the date of the second Codicil, the Testator made a third, dated the 11th of June 1831, in the following words: "Whereas, by my last Will and Testament, I bequeathed to my dear Brother, *Hall Overend*, all my Real Estates and

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constituted him my Residuary Legatee, which Devise, by his lamented death, is become lapsed ; now my Will is, and I do hereby give and bequeath to my Sister-in-Law, *Ruth Overend*, the Widow of my late Brother, an Annuity of 500 *l.*, for and during the term of her natural life, payable half-yearly out of the Interest and Dividends arising from my Property invested in the Public or Foreign Funds : and I do direct my Executors to hold, in Trust for this purpose, an adequate amount of my Property so invested : and, *as to the rest and residue of my Personal Estate and Effects*, I desire and direct my Executors to pay the Income arising from the same and as it accrues, to my dear Friend, *Mary Kitching*, for her own sole use and benefit, so long as she may live, and, after her decease, I give and bequeath the Sum of 10,000 *l.* to such Person or Persons as she, the said *Mary Kitching*, by her last Will and Testament in writing or any Codicil or Codicils thereto, shall direct, limit or appoint, give or bequeath the same, and, in default of such Direction, Limitation or Appointment, Gift or Bequest, to such Person or Persons as would, under the Statute for the Distribution of Intestates' Estates, be entitled to the same as her Next of Kin : and, as to my Real Estates, and in especial consideration of my contemplated Marriage with my dear Friend, *Mary Kitching*, I do hereby give, devise and bequeath to my said dear Friend *Mary Kitching*, or, if she become my Wife, then, at my decease, to her as my Widow, in addition to the Provision I have already made for her in my Will and Codicil, all my Freehold, Copyhold and other Real Estates in the several Counties of *Monmouth*, *Middlesex* and *Yorkshire*, and elsewhere in *England* and *Wales*, to have and to hold the said Estates to my said Friend and her Assigns, for and during the term of her natural life, without Impeachment of Waste, and to have,

receive and take the Rents, Issues and Profits of the said Estates to and for her sole use and benefit ; and, from and after her decease, then I give and bequeath all my said Freehold, Copyhold and other Real Estates unto *Samuel Gurney, John Allcard and Robert Forster*, my Executors in the said Will named, their Heirs and Assigns, upon Trust that they the said *Samuel Gurney, John Allcard and Robert Forster*, and the Survivors and Survivor of them, and the Heirs and Assigns of such Survivor, do and shall, *as soon after the decease of Mary Kitching as may be convenient*, sell and dispose of and convert into Money all my said Freehold, Copyhold and other Real Estates, and either by Public Sale &c., and the net Proceeds of such Estates I direct to fall into and become part of my general Personal Estate : I give and bequeath to my Nieces *Isabel, Hannah, Martha and Elizabeth*, the four Daughters of my late Brother *Hall Overend*, the Sum of 10,000 *l.* each, *in addition to the Legacies which I have given them by my said Will* ; and I do direct that the said Sum for each respectively, *be held by my said Trustees* in Trust for their respective separate Uses for life, independent of their present or any future Husbands, and so as the same or the Interest or Proceeds thereof may not be liable to the Debts &c ; and, after the decease of each of my said Nieces, I give the Principal of each Legacy in the same way as I have, in my Will, directed the Principal of their respective Legacies to go when paid : And as to all *the clear Residue* of my Estate, after providing for the before-mentioned Legacies, and also those given by my said Will and former Codicil, I do give and bequeath the same unto and equally to be divided between and amongst my Nephews *John Overend, Wilson Overend and William Overend*, the three Sons of my late Brother, share and share alike."

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The Question was whether the Legacies of 10,000 l. given by the third Codicil, to the Testator's Nieces, were payable in the Plaintiff's lifetime.

Sir *E. Sugden*, Mr. *Jacob* and Mr. *Humphry*, for the Plaintiff:

The Question arises on the third Codicil, which the Testator made in order to dispose of the Property which had become lapsed by the death of his Brother, *Hall Overend*.

It is clear that the Testator intended greatly to benefit *Mary Kitching*, whom he afterwards married. He gives to her, for her life, all his Real Estates and the Residue of his Personal Estate which he had, before, given to his Brother; so that the whole of his Real and Personal Estate was disposed of during the life of *Mary Kitching*. How then can the Legacies given to the Nieces in the subsequent part of the Codicil, be payable in her lifetime? The Testator then proceeds to dispose of his Property after the death of *Mary Kitching*, and directs his Real Estates to be sold as soon after her death as might be convenient, and the Proceeds to fall into his general Personal Estate, which he had already dedicated to her for life. He then gives the Legacies to his Nieces and directs them to be held by his Trustees. But how are the Trustees to get them? They are charged on the Proceeds of the Real Estates: that Fund however will not reach the hands of the Trustees until after the death of *Mary Kitching*. Then follows this clause: "And as to all the clear Residue of my Estate, after providing for the before mentioned Legacies and also those given by my said Will and former Codicil." As there was no Residue undisposed of until after the death of *Mary*

Kitching, the Residue here spoken of, must be the Residue after her death.

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If the Legacies given to the Nieces, stood by themselves, they would be payable immediately: but they are placed between two Gifts, both of which are reversionary. The Gift to the Nephews, though in words of present Gift, is clearly reversionary: and the same observation applies to the preceding Gift.

It will be said that the Legacies are payable immediately, because they are given *in addition* to the Legacies given by the Will to the same Parties, which are payable immediately. But, in *Chatteris v. Young* (a) Sir John Leach V. C. says that it is a mere *prima facie* Rule that an addition to a Legacy is to have the same qualities as the original Legacy. The Case of *Clifford v. Lewis* (b) is an authority that, in construing Testamentary Instruments, the order in which the Gifts occur, is to be regarded. If, in the first instance, there is a Disposition of the Income of a Fund, and then a Gift of particular Legacies, the inference is that the Legacies were meant to be postponed until after the expiration of the first interest. *Young v. Burdett* (c). The Testator intended to place his Nieces on an equality with his Nephews, as to the time at which they were to be paid their Legacies. The Nephews cannot take till after the death of the Widow, and, therefore, the Nieces do not take till after that event.

Mr. Knight and Mr. Kindersley, for the Defendants, the Testator's Nephews:

The Testator gives the *clear* Residue of his Estate:

(a) Madd. & Geld. 30.

(b) Ibid. 33.

(c) 5 Bro. P. C. Ed. Tomlins, 54. This Case is reported on the hearing in the Court of Chancery, in 9 Mod. 93.

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before he had given *the* Residue. The Residue given to the Nephews is reversionary ; and he calls it *clear*, because he had, just before, taken the Legacies to the Nieces out of it.

The *Solicitor-General*, Mr. *Wakefield* and Mr. *Hodgkin* for the Defendants, the Testator's Nieces :

The point on which the Judgment in *Young v. Burdett*, ultimately turned, is not only wanting in this Case, but the very reverse is found. There the Testator gave, to his Wife, *all his Personal Estate*. She could not take all his Personal Estate, if the Legacies were to be paid out of it. But if, as in this Case, he had given to her the *Residue* of his Personal Estate, the decision would have been otherwise. Here we find a distinct, substantive, unconnected Bequest, in words of present Gift, of 10,000*l.* to each of the Nieces. The Trustees are the same persons as the Executors ; and, being in possession of the Fund, they are to retain the Legacies out of it. The Testator knew how to make a Disposition after a Life Interest ; for he twice uses the expression : “and after her decease.” Can it be said that a Legacy is to be postponed, merely because it comes after a Residuary Gift ? The Testator, by his Will, gives 20,000 *l.* to the Trustees in Trust for his Nieces, for their lives, and, after their deaths, for their Children. By the Codicil, he gives them 10,000*l.* each, *in addition to* the Legacies given by the Will. The Legacies given by the Will, are payable immediately ; and, therefore, the Legacies given by the Codicil, are also payable immediately. *Leacroft v. Maynard* (*d*), *Crowder v. Clowes* (*e*). The Testator then directs that the Legacies given by the Codicil, shall be held by his Trustees, in Trust for his Nieces for their lives, and that, after their deaths, the Principal shall go

(*d*) 1 Ves. Jun. 279.

(*e*) 2 Ves. Jun. 449.

in the same way as he had directed the Principal of the Legacies given by his Will, to go when paid. The Counsel for the Plaintiff, however, say that another Life Interest, namely, that of the Widow, is to be interposed. *Wight v. Cundall* (f), *Wordsworth v. Younger* (g), *Long v. Long* (h).

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Mr. *Lovat*, for the Trustees.

The VICE-CHANCELLOR :

No Reply is necessary.

The Testator's Brother was the principal object of disposition in the Will ; but it is manifest that he had a great affection for *Mary Kitching*. By the Will he gives his Estate at *Tottenham* and the Dividends of 50,000 *l.* Consols to *Mary Kitching* for life, and, after her death, to his Brother ; then he gives his Furniture and other Effects, in and about his Premises at *Chitt's Hill*, to *Mary Kitching*, absolutely, and afterwards, he gives Legacies to the Sons and Daughters of his Brother ; and, having, as appears by the Codicil, other Real Estates besides his Estate at *Tottenham*, he gives all the rest and residue of his Estate and Effects whatsoever and wheresoever, and of what nature or kind soever the same might be, to his Brother, his Heirs, Executors and Administrators, according to the respective nature and quality thereof. Now it is to be observed that, by the Will, the Brother is made to take, in possession, all the Personal Estate, subject to the payment of the Legacies and to the Life-interest in the 50,000 *l.* Stock given to *Mary Kitching*, and also all the Real Estate in possession, except the Estate at *Tottenham*. From the Recitals in the third Codicil it manifestly appears that the Testator's intention, when he made that instrument, was

(f) 9 East. 400.

(h) Ibid. 286, note.

(g) 3 Ves. 73.

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to dispose of that portion of his Property which, by the death of his Brother, had become undisposed of, namely, the rest and Residue of his Real and Personal Estate. He, first, gives an Annuity to his Brother's Widow, and then he says: "And as to the rest and Residue of my Personal Estate and Effects, I desire and direct my Executors to pay the income arising from the same, and as it accrues, to my dear friend *Mary Kitching*, for her own, sole Use and Benefit so long as she may live." In this Clause, therefore, the Testator meant *Mary Kitching*, for her life, to be substituted, for his Brother, with respect to his Personal Estate, except as to the Annuity given to his Brother's Widow. He then gives her power to dispose of 10,000 *l.*, and directs that, in default of her disposing of it, it shall go to her Next of Kin. Then he says: "As to my Real Estates, and in especial consideration of my contemplated Marriage with my dear friend, *Mary Kitching*, I do hereby give, devise and bequeath, to my dear friend *Mary Kitching*, or, if she become my Wife, then, at my decease, unto her as my Widow, in addition to the provision I have already made for her in my Will and Codicil thereto, all my Freehold, Copyhold and other Real Estates in the several Counties of *Monmouth*, *Middlesex* and *Yorkshire* and elsewhere in *England* and *Wales*, to have and to hold the said Estates to my said Friend and her Assigns, for and during the term of her natural life." This Codicil appears to me to represent the state of the Testator's mind at the time when he made it: and it shows that he had an increased affection for *Mary Kitching*, and that he meant, with respect to his Real as well as his Personal Estate, to substitute her, for her life, for his Brother. Then follows the Clause by which the Testator directs his Real Estates to be sold and the net Proceeds to fall into and form part of his general Personal Estate. Then

he gives to his Nieces the sum of 10,000 *l.* each, in addition to the Legacies which he had given them by his Will. Now I admit that, generally speaking, if a Legacy in a Codicil, is given in addition to a Legacy in the Will, it will partake of the same incidents. But it is obvious that a Legacy to take effect after *A.*'s death, is as much in addition to another Legacy to take effect before *A.*'s death, as if it had been to take effect before *A.*'s death. But, when the Testator directs that the Legacies given to his Nieces, shall be held by his Trustees, (to whom he had given the Residue of his Personal Estate and his Real Estates in Trust to sell after the death of *Mary Kitching*), those words afford an implication that the Legacies given to his Nieces, were to come out of the aggregate Fund consisting of his Personal Estate, after the death of *Mary Kitching*, and the Proceeds of his Real Estates which were not to be sold until after her death. The Testator then gives all the clear Residue of his Estate, after providing for the before-mentioned Legacies and also those given by his Will and former Codicil, to his Nephews: and as, under the Will, the Nephews and Nieces take contemporaneously, so, under the Codicil also, they take contemporaneously, but after the death of the Testator's Widow.

My Opinion is that the clear meaning of the Testator, on the whole of the Instrument, was that the Legacies given to his Nieces, should not be payable till after the death of his Widow.

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v.
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1834 :
30th July.

*Infant.
Practice.*

A Co-plaintiff who was an Infant when the Suit was instituted, moved, on coming of age, that his Name might be struck out of the Bill. Motion granted.

ACRES v. LITTLE.

ONE of the Plaintiffs who was an Infant when the Suit was commenced, but had since come of age, moved that his Name might be struck out of the Bill.

The *Solicitor-General*, in support of the Motion.

Sir *E. Sugden* and Mr. *Parker*, *contra*, said that Evidence had been gone into in the Cause, and that, if the Plaintiff's Name were struck out, all the Proceedings in the Cause would be affected by it, and that the Plaintiff ought to be indemnified against the Costs of the Suit, and his Name allowed to remain on the Record.

The *Vice-Chancellor* ordered the Plaintiff's Name to be struck out.

1834 :
31st July.

*Practice.
Sale under
Decree.*

A Purchaser under a Decree, agreed to sell the Lots he had purchased, to *A.* and died, his Heir being abroad. Or-

dered that *A.* should be substituted for him as the Purchaser, and should be at liberty to pay the Purchase-money into Court and be let into possession.

PEARCE v. PEARCE.

PART of the Estates of the Testator in this Cause, which had been sold under the Decree, were purchased by one *Joyner*, and the report of his being the Purchaser had been absolutely confirmed. Afterwards he agreed, in writing, to sell the Lots he had purchased, to one *Dix*. *Joyner* having died and his Heir being in *America*,

Mr. *Blunt*, for *Dix*, moved that he might be substi-

tuted as the Purchaser in the place of *Joyner*, and might be at liberty to pay the Purchase-money into Court in Trust in the Cause, and be let into possession ; and referred to *The King v. Gregory (a)*.

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v.
PEARCE.

Mr. *Wilbraham* appeared for the Parties in the Cause and consented to the Motion.

The *Vice-Chancellor* granted the Motion, and ordered *Dix* to pay the Costs of it.

(a) 4 Price, 380.

MURRAY v. LAWFORD.

1834 :
7th August.

A COMMISSION to examine Witnesses in this Cause, having been awarded to the Judges of the Supreme Court at *Madras* (see ante Vol. 6, page 573), a question arose as to the form of the Commission.

*Commission to
examine Wit-
nesses.*

On this day, The *Vice-Chancellor* said that he had conferred with The *Lord Chancellor* on the subject, and that they had agreed that the Commission ought to recite the Pleadings at length.

A Commission
to examine
Witnesses,
awarded to the
Judges of one
of the Supreme
Courts in *India*,
under 13 Geo.
3, c. 63, s. 44,
ought to recite
the Pleadings
at length.

1844:
9th August.

Practice.
Commitment.

—
A Motion to
Commit cannot
be made except
on a Seal-day.

SAXBY v. SAXBY.

AN Order had been made for a Party to pay a Sum of Money into Court within four Days, or that he should stand committed. The time having expired without the Money being paid,

Mr. *Wray* moved, on the next day, which was a continuation of the last Seal, to commit the Party.

The *Vice-Chancellor* refused the Motion, saying that it was against the course of the Court to make an Order affecting the liberty of the Subject, except on a Seal-day.

1834:
9th August.

Practice.
Plaintiff.
Costs.

—
A Plaintiff, who
had misde-
scribed his Re-
sidence, ordered
to give Security
for Costs.

SANDYS v. LONG.

MOTION, by Defendant, either that the Bill might be taken off the File, or that the Plaintiff might be ordered to give Security for Costs, he having misdescribed his Residence in the Bill.

Sir *E. Sugden* and Mr. *Monro*, for the Motion.

Mr. *Cooper*, *contra*.

The *Vice-Chancellor* ordered the Plaintiff to give Security for Costs.*

* Affirmed by Lord *Lyndhurst*, C. See 2 Myl. & Keen, 487. See 2 Fowl. Excheq. Pract. 311.

LETHEM v. HALL.

THE *Master* having reported as to the Allowance to be made for placing the Plaintiff, who was an Infant, at College, and for his Maintenance and Education there, the Defendants, *Hall* and Wife, who were his Guardians, presented a Petition stating that the Plaintiff was born in *Ireland*; that his Father (who was afflicted with mental and bodily infirmity) and his Sisters were resident there, and that it was the wish of the Plaintiff and all his Friends that he should be placed at The University of *Dublin*, in order that he might be in his native Country, near to his Father and Sisters. The Petition prayed that the Petitioners might be at liberty to place the Plaintiff at The University of *Dublin*, and that the Allowance might be paid to them.

1824 :
9th August.

Infant.

An Infant allowed to be placed at The University of *Dublin*, under special circumstances.

Mr. *Dixon*, for the Petitioners.

Mr. *Lovat* and Mr. *Stuart* for other Parties.

The *Vice-Chancellor* granted the Prayer of the Petition.

The Order, as drawn up, directed that, upon the Petitioners entering into a Recognizance, to be approved of and certified by The *Master*, to bring the Infant within the Jurisdiction of the Court whenever they should be required so to do, they should be at liberty to place him at The University of *Dublin*, during his Minority or until the further Order of the Court; and that the Allowance should be paid to the Petitioners, half-yearly, the first Payment to be made at the end of the first six

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v.
HALL.

months after the Infant should have been placed at The University, and the fact of his having been so placed and of his continuing there, to be, from time to time, verified by Affidavit.

MEMORANDUM.

In September 1834, Sir *John Leach*, M. R. died. He was succeeded by

Sir *C. C. Pepys*, His Majesty's Solicitor-General, who was sworn in a Member of the Privy Council.

In Michaelmas Term following *R. M. Rolfe*, Esq., one of His Majesty's Counsel, was appointed Solicitor-General.

1834:
3d November.Practice.
Pro Confesso.

Motion by a Defendant, against whom the Bill had been ordered to be taken *Pro Confesso*, that the Order might be discharged, and he be at liberty to put in his Answer. Motion refused, although the Defendant did not mean to enter into Evidence, and, the Case against him being the same as against the other Defendants, he consented to the Evidence which had been taken, being read against him.

CARR v. PAULETT.

THE Bill was filed in July 1830. In December 1833, it was ordered to be taken *Pro Confesso* against one of the Defendants; but the Cause had not been heard.

Mr. *Knight* and Mr. *Hislop Clarke* for that Defendant, now moved that the Order for taking the Bill *Pro Confesso*, might be discharged, and that the Defendant might be at liberty to put in his Answer.

They said that the Defendant did not intend to enter

into Evidence; that the Case as against him, was the same as against the other Defendants, and that he had no objection to the Evidence which had been taken against them, being read against him also; and they referred to *Hearne v. Ogilvie*(a) and *The Bishop of Rochester v. Knapp*(b).

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v.
PAULETT.

Sir E. Sugden appeared to oppose the Motion, but,

The Vice-Chancellor, without hearing him, observed that Lord Eldon did not make any Order in *Hearne v. Ogilvie*, and that he knew of no instance in which a similar Application had been granted, and, therefore, that the Motion must be refused with Costs.*

(a) 11 Ves. 77.

(b) 1 Dick. 70.

* See next Case.

JAMES v. CRESSWICKE AND OTHERS.*

1834:

31st January.

Practice.
Pro Confesso.

THE Defendant being in Contempt for not answering the Bill, and being already in the *Fleet*, was brought, on the 21st of November, to the Bar of the Court, and ordered to put in his Answer within 28 Days; and he was then remanded to the *Fleet*, under 11 G. 4, & 1 W. 4, c. 36, Rule 2. The 28 Days having elapsed without the Defendant having put in his Answer, he was again brought to the Bar of the Court on the 20th of December:

The Order for taking a Bill *Pro Confesso*, takes effect from the time when it is pronounced; and the Court will not discharge the Order, although

the Answer is filed before the rising of the Court on the day on which the Order is made.

* Ex Relatione.

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 JAMES
 v.
 CRESSWICKE
 AND OTHERS.

And Mr. *Ombler*, for the Plaintiff, then moved that the Bill might be taken *Pro Confesso* as against the Defendant.

Mr. *Kenyon Parker*, for the Defendant, said that the Defendant would file his Answer before the rising of the Court, and that the Defendant was entitled to be allowed that time, for that purpose.

Mr. *Ombler* said that the Act was imperative, and therefore, the Court had no power to allow any further time, without the consent of the Plaintiff. Upon which,

The *Vice-Chancellor* made the Order for taking the Bill *Pro Confesso*.

The Defendant did, however, file his Answer before the rising of the Court on the 20th of December; and, on the 31st of January 1834,

Sir *E. Sugden*, for the Defendant, moved that the above Order might be discharged, on the ground that the Defendant had till the expiration of the day on which he was brought up for the second time, to file his Answer.

The *Vice-Chancellor*, without hearing Mr. *Ombler*, held that the Act was imperative, and that the Order took effect from the time of its being pronounced.

Motion refused.*

* See the preceding Case.

TONER v. THOMPSON.

1834:
6th November.

Costs.
Accountant.

THIS was a Suit for the Administration of an Intestate's Estate, and, by the Decree, the usual Accounts were directed to be taken, and further Directions and Costs were reserved. The *Master* made a separate Report, from which it appeared that the Administratrix had, at first, produced before him some only of the Books and Papers, in her custody, relating to the Intestate's Estate, and that she did not produce the others, until she had been served, from time to time, with Warrants for that purpose: that, on the Books being inspected by the Plaintiffs' Solicitor and by an Accountant employed by them, it was discovered that she had wholly abstracted some of the Leaves, and had made Erasures and Alterations in others of them: that The *Master*, in consequence of the fraudulent and evasive conduct of the Administratrix, and of her refusal to make a full and fair discovery as to the Matters referred to him, had directed her to be examined, *vivâ voce*, before him, in order to enable him to take the Accounts directed by the Decree; and that, upon her being so examined, it appeared that, before putting in her Answer, she had received several Sums, on account of the Intestate's Estate, which she had not admitted in her Answer.

In taking the Accounts of an Intestate's Estate, the Plaintiffs, in consequence of the evasive and fraudulent conduct of the Administratrix, had been under the necessity of employing an Accountant. Before the Hearing for further Directions, the Administratrix was ordered to pay the Costs of employing the Accountant.

Before the Cause was heard for further Directions, the Plaintiffs presented a Petition stating, (amongst other things) that it was owing to the employing of the Accountant, that the fraudulent conduct of the Administratrix had been discovered; and that, if the Accountant had not been employed, she would have been able to withdraw, from the Intestate's Estate, large Sums

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v.

THOMPSON.

which were due from her ; and praying that the Administratrix might be ordered to pay, to the Plaintiff Solicitor, the Costs, Charges and Expenses properly incurred by them in employing the Accountant.

Sir *E. Sugden* and Mr. *G. Richards*, in support of the Petition.

Mr. *Knight* and Mr. *Wigram*, for the Administratrix said that it was quite unprecedented for the Court to make any Order as to Costs, before the Hearing for their Directions ; that the Court could not judge of proceedings in The Master's Office, in the present state of the Cause ; that the expense of the Suit was greatly increased by bringing questions, separately, before the Court ; and that, if the Plaintiffs were entitled to Costs to which the Petition related, they would be allowed them when the Cause was heard for further Directions.

Mr. *Girdlestone, jun.* and Mr. *Hetherington* appeared for other Defendants.

Mr. *G. Richards* in reply :

The Costs in question have been occasioned by the fraudulent conduct of the Administratrix ; and The Master has made a separate Report in consequence of such conduct. It is sworn that it would have been impossible to detect the Frauds which she has practised, unless an Accountant had been employed. The Costs reserved by the Decree, are the ordinary Costs of the Suit : and to which the Petition relates, are extraordinary Costs which have been occasioned by the fraudulent conduct of the Administratrix. If, on the Hearing for further Directions, the Plaintiffs are to have Costs as between Party and Party merely, they will not be allowed

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Costs of employing the Accountant. At all events, the Intestate's Estate, to which the Plaintiffs are entitled, ought not to bear those Costs.

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THOMPSON.

The VICE-CHANCELLOR :

The necessity for employing the Accountant, arose from the conduct of the Administratrix : and I cannot but think that the Costs of employing him are in a different situation from the Costs of the Parties in the Cause ; for, in an ordinary Case, the Costs of employing an Accountant would not be allowed in The Master's Office ; and, therefore, it is not premature for the Court now to decide as to those Costs.

As the Costs in question have been incurred in consequence of the fraudulent conduct of the Administratrix, it is but reasonable that she should pay them. Therefore, refer it to The Master to ascertain the Costs properly incurred, by the Plaintiffs, in employing the Accountant, and order the Administratrix to pay them : and let the Costs of the Petition be Costs in the Cause.

STEED v. CALLEY.

1834 :
3d November
and
4th December.

*Infant.
Defendant.
Process.*

A Messenger had been ordered to bring an Infant Defendant into Court, to have a Guardian assigned for putting in her Answer. The Messenger's Return stated that the Infant was secreted by her Mother

The *Vice-Chancellor* ordered the Senior Six Clerk to be appointed the Guardian, without the Infant being produced.

ONE of the Defendants, who was an Infant, having appeared, but not having put in her Answer, a Messenger had been ordered to bring the Infant into Court, in order that a Guardian might be assigned her, by whom she might answer the Bill and defend the Suit. The Messenger's Return stated that he had made diligent inquiry after the Infant, who, he had every reason to believe, was under the Protection of her Mother, of whom he had made inquiry, but who refused to give him any clue to the finding the Infant.

Mr. *Hetherington*, for the Plaintiff, now moved, upon Notice served upon the Clerk in Court who had appeared for the Infant, that the Senior Six Clerk might be appointed Guardian to the Infant, and might put in an Answer for her.

The *Vice-Chancellor*, after having taken time to inquire into the Practice, ordered the Senior Six Clerk, not towards the Cause, to be appointed Guardian to the Infant, by whom she might Answer the Bill and defend the Suit.*

* The mode of compelling an Infant Defendant to put in an Answer, (and which was adopted in the above Case) is to seal an Attachment against the Infant, but not to execute it : and, as soon as the Attachment is sealed, and before it is returnable, the Plaintiff is at liberty to move for a Messenger. *Smith's Practice*, 95, 124. See *Hancock v. Bannister*, *Ibid.* 185 : and *Eyles v. Le Gros*, 9 Ves. 12.

FLIGHT v. BENTLEY.

By an Indenture of the 21st of August 1824, *Rosseter* demised to *Nelson* a House and Garden on *Newington Causeway*, for the term of $24\frac{1}{2}$ years from Midsummer-day then last, subject to the payment of the annual Rent of 55 *l.* and to the performance of the Covenants in the Indenture contained. By an Indenture of the 17th Nov. 1824, *Nelson* underlet the Premises, to *James Postlethwaite*, for 10 years from the 25th of December then next, at the yearly Rent of 100 *l.*, payable quarterly, and subject to the performance of the Covenants in the same Indenture contained. *Postlethwaite* entered into possession of the Premises; and, being indebted to the Defendants, *Bentley*, *Pawson* and *Woolmer*, he, on the 1st of March 1830, deposited with them the Underlease, as a Security, by way of Equitable Mortgage, for the Debt. On the 16th of Dec. 1831, *Nelson* became Bankrupt, and *Landell* and *Finch* were chosen his Assignees. In March 1832, the Assignees sold, by Auction, to the Plaintiff, the Bankrupt's Interest in the Premises; and, under the Conditions of Sale, the Plaintiff was to pay all Outgoings, and to take all Profits in respect of the Premises, from the 25th of March 1832. By an Indenture of the 20th of July 1832, the Bankrupt and his Assignees assigned the Premises (subject to the Underlease) to the Plaintiff, for the remainder of the term of $24\frac{1}{2}$ years from the 25th of March then last.

On the 14th of July 1832, *Postlethwaite*, took the benefit of the Insolvent Debtors' Act, and the Defendants, *Allan* and *Smith*, were chosen his Assignees. *Bentley & Co.* never took possession of the Premises:

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27th April,
1st & 13th May,
and 9th June.

*Landlord and
Tenant. Reversioner. Rent.*

—
The Assignee of a Reversion, is not entitled under 32 H. 8, c. 34, to Arrears of Rent which became due prior to the Assignment.

*Equitable
Mortgage.
Deposit.*

—
The Depositary of a Lease for securing a Debt, is liable to the Rent and Covenants, although he has not taken possession of the Premises.

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but, although they were requested, by or on behalf of the Plaintiff, to deliver up the Underlease, and were, at the same time, told that they would be liable to the Rent and Covenants if they continued to hold it, they refused to deliver it up unless they were paid for so doing.

In Dec. 1832, the Bill was filed against them, and also against *Postlethwaite's* Assignees, praying that it might be declared that *Bentley & Co.* were, as Mortgagees of the Underlease, bound to pay the Rent and perform the Covenants therein reserved and contained, and that they might be decreed to pay and perform the same accordingly, and, if necessary, that *Postlethwaite's* Assignees might be decreed to execute to them a valid, legal Assignment, by way of Mortgage, of the Underlease and the Premises therein comprised.

After the Plaintiff's case had been opened by *Mr. Knight*, (with whom was *Mr. Stuart*), *Mr. Rogers*, for the Defendants *Bentley & Co.*, said that the Plaintiff claimed all the Rent that had become due for the Premises since the 25th of March 1832; that the Assignment to the Plaintiff was dated in July 1832, and, consequently, the Rent which became due at Midsummer in that year, accrued prior to the date of the Assignment and did not pass, with the Reversion, to the Plaintiff, but belonged, at Law, to *Nelson's* Assignees; and that they, being the Parties who had the legal right to enforce payment of that Rent, were the only Persons who could give a Discharge for it, and, therefore, they ought to have been made Parties to the Suit. *Athowe v. Heming* (a). *Midgley v. Lovelace* (b).

(a) 1 Rolle's Rep. 80.

(b) Carthew, 289.

Mr. *Knight*:

The Assignees of *Nelson*, having parted with the Reversion, can neither sue nor distrain for the Rent. The Reversion and all the Interest in the Premises, passed, by the Assignment, to the Plaintiff, and he is the only Person who is entitled to sue for the Rent. The 32d H. 8, c. 34, gives the right of Action to the Assignee, and that right of Action is not confined to Breaches of Covenant after the Assignment. The beneficial Interest in the Rent is clearly conferred on the Plaintiff, and it is immaterial that the Breach occurred before the Assignment, the Covenant being incident to the Reversion.

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v.
BENTLEY.

The VICE-CHANCELLOR:

I cannot, at present, say what the Construction of the Statute is,—whether it authorizes the Assignee of a Reversion to sue for Arrears of Rent accrued before the Assignment. The Cause must stand over in order that I may look into the point.

On this day His *Honor* said that he had consulted some of The Judges of the Courts of Common Law upon the point, and that their Opinion was that, though the Assignment would give, to the Assignee, the entire Title to the Rent to become due on the Quarter-day next after the Assignment, yet it was clear that the Assignment would not, at Law, pass the antecedent Rent; for it had been severed from the Reversion, and was a mere Chose in Action; and, therefore, if the Bill was so framed as to attempt to get the antecedent Rent, the Bankrupt's Assignees must be made Parties to the Suit.

13th May.

Mr. *Knight* and Mr. *Stuart* waived the Claim to the

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Rent accrued prior to the Assignment, and proceeded to argue the Case as follows :

A Court of Equity must view an Equitable Assignee of a Lease, in the same light as if he were a Legal Assignee. If *Bentley & Co.* are Assignees in Equity, they are liable, in Equity, to the Covenants, and are bound to do every thing to enable the Plaintiff to enforce the Covenants at Law. *Lucas v. Comerford* (c) is an express decision on the point ; and there is no difference between that Case and this.

The Defence that *Bentley & Co.* set up, is that they have not taken Possession of the Premises ; they, however, claimed the benefit of the Deposit and refused to deliver it up. Besides, it was decided, in *Williams v. Bosanquet* (d), that, where a Party takes an Assignment of a Lease, he becomes liable on the Covenant for payment of the Rent, though he has never taken Possession of the demised Premises. *Burton v. Barclay* (e) involved the decision of the same point.

Mr. Rogers, for the Defendants *Bentley & Co.* :

The Depositary of a Lease has a right to consider himself either as an Assignee, or as an Underlessee. The Case of *Lucas v. Comerford*, has never been acted upon. In that Case, too, the Depositary of the Lease had taken Possession of the Premises, as appears from the Judgment in *Wilkins v. Fry* (f). Besides, in this Case, the Underlease expired at Christmas 1834.

Mr. Wood appeared for the Assignees of *Bentley*, who became Bankrupt pending the Suit.

(c) 1 Ves. Jun. 235. S. C.
3 Bro. C. C. 166.

(c) 7 Bing. 745.
(f) 1 Mer. 264.

(d) 1 Brod. & Bing. 238.

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Mr. *Wailes* appeared for *Postlethwaite's* Assignees.

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Mr. *Knight*, in reply :

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The Decision in *Lucas v. Comerford*, was not grounded on Possession having been taken, but on the Deposit. That Case was not questioned, by Sir *W. Grant*, in *Wilkins v. Fry*, and it was cited with approbation in *Williams v. Bosanquet*. A Deposit of a Lease amounts to nothing short of an Assignment ; and *Lucas v. Comerford* decides that the Depositary is actual Tenant.

The VICE-CHANCELLOR :

The only Question is whether I am bound by the Decision in *Lucas v. Comerford*. There is no authority to say that I am not bound by it. Therefore the Equitable Depositaries of the Lease of the 17th of November 1824, must be considered as being responsible to the Plaintiff, who became the Owner of the Reversion by the Assignment of July 1832, for all the Rent from Midsummer 1832 to the termination of the Lease at Christmas 1834. The consequence is that an Account must be taken of the Rent that accrued during that time, and the Amount found due, must be paid, by *Pawson* and *Woolmer*, to the Plaintiff : and, as the Suit was rendered necessary by the refusal of *Bentley* and his Copartners to deliver up the Underlease, the Plaintiff must, in the first instance, pay the Costs of *Bentley's* Assignees, and those Costs, up to the time of their putting in their Answer (when, in consequence of their having disclaimed, the Bill ought to have been dismissed as against them) must be repaid to him by *Pawson* and *Woolmer*, and the Plaintiff must, in like manner, pay the Costs of *Postlethwaite's* Assignees and have them over again from *Pawson* and *Woolmer*.

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FIGHT

v.

BENTLEY.

Rent accrued prior to
to argue the Case.

A Court of Equity
of a Lease, in the

signee. It is
are held by the
to do so, and
Covenant to
press of the
between the
The *London Dock Company*
were authorized to
such Houses, Buildings,
as they should judge
and down, alter or make up
and other Works: And
and be lawful for all Bodies
Corporations Aggregate
or others having a partial
in any Houses, Lands, Tenements,
Femes Covert, Guardians of the
Trust for Charities or other
Executors, or Administrators
whomever, not only on behalf of the
Heirs, Executors,
but also on behalf of the
Reversion or Remainder expectant

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NGERS' COMMISSIONERS

express directions were given,
as to the pay-
ment of the
for pur-
was enacted that all
Causes, Matters
the subsequent Act.
the Reinvesting of
such Rein-
the subsequent Act.

an Estate Tail, and on behalf of all Persons entitled in Reversion or Remainder expectant on an Estate for life or other less Estate, or by way of executory Devise, in case such Persons should be incapacitated or decline to treat, and on behalf of their respective Wives and *cestui-que Trusts*, whether Infants, Issue unborn, Lunatics, Idiots, Femmes Covert, or others, and for all and every other Person or Persons whomsoever, who were or should be seised, possessed of or interested in any such Houses, Lands &c., to treat and agree with the Directors of the Company, for the absolute Sale of, and to sell and convey to them, for such valuable Consideration as should be *bonâ fide* agreed upon for such Houses, Lands &c., as should be judged necessary and convenient for the Purposes of the Act. Sect. 33.

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That if any Body Politic, or Person should refuse to agree or, by reason of absence or disability, could not agree, for the Sale of such Houses &c., it should be lawful for the Directors or any five or more of them, to issue a Warrant or Precept to the Sheriff of the County in which the Houses should be situate, who should summon a Jury to ascertain and award the Sums to be paid for such Houses &c. Sect. 34.

That if any Money should be agreed or awarded to be paid for any Lands &c. purchased by virtue of the Powers of the Act, which should belong to any Corporation, Feme Covert, Infant, Lunatic or Person or Persons under any other disability or incapacity, such Money should, in case the same should amount to 200*l.*, be paid into the Bank of *England*, in the name of The Accountant-General of the Court of Chancery; and that the same should be laid out, under the direction and with the approbation of the Court, to be signified by an Order made upon a Petition to be preferred by

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the Person or Persons who would have been entitled to the Rents and Profits of the Lands &c., in the purchase of other Lands &c., which should be conveyed to the same Uses as the Lands &c., sold to the Commissioners stood limited to; and that, in the mean time, the Purchase should be invested, by the Accountant-General, at the rate of purchase of 3*l.* per Cents, and that the Dividends should be paid to the Person or Persons who would have been entitled to the Rents of the Lands sold to the Commissioners. Sect. 39.

Provided that where, by reason of any disability or incapacity of the Person or Persons or Corporation entitled to any Lands, Tenements or Hereditaments purchased under the authority of the Act, the Purchase-money for the same should be required to be paid in the Court of Chancery and to be applied in the purchase of other Lands, Tenements or Hereditaments to be sold to the like Uses in pursuance of the Act, it should be lawful for the Court of Chancery to order *the Expenses of all Purchases, from time to time to be made in pursuance of the Act, or so much of such Expenses as the said Court should deem reasonable, to be paid by the Company, who should from time to time pay such Sum of Money for such purposes as the Court should direct.* Sect. 43.

That it should be lawful for *The Lords of the Treasury* for the time being, if they should think proper, within two years next after the passing of the Act, to purchase of the several Owners, Lessees and Occupiers all or any of the Legal Quays, and the Warehouse Buildings and other Works annexed thereto or now occupied or employed therewith, situate between *London Bridge* and the *Tower of London*, or any part or

thereof, their several and respective Estates and Interests of and in the same Premises respectively ; and, for that purpose should have all necessary and requisite powers to Contract with any Person or Persons whatsoever, or their Trustees, Guardians, Committees or Assigns, for such Price or Prices as might be agreed upon, and, in case of difference, for such Price or Prices as should be settled by a Jury to be summoned, impannelled and sworn in such manner as was thereinbefore directed in respect of Purchases to be made by The *London Dock Company*, but so as that the Warrant or Warrants, Precept or Precepts for the impannelling, summoning and returning such Jury, instead of being issued by the Directors of the Dock Company, should be issued by the Lords of the Treasury for the time being, and which Jury, in settling such Price or Prices, should consider as well the Goodwill and Improvements, as any Injury or Damage that might affect any such Person or Persons either as Owner, Lessee or Occupier, provided that such Goodwill should be estimated by what, in the opinion of such Jury, the same would have been worth in case the Improvements intended by the Act had not been in contemplation ; and all and every the Person or Persons, their Trustees, Guardians, Committees or Assigns so contracted with, should have full power to convey all and every the Premises, or any part or parcel thereof, to the Lords of the Treasury for the time being, who, for that purpose, should be deemed and taken to be a Body Corporate : and the Lords of the Treasury were thereby empowered and directed to pay for such Purchase or Purchases out of the Consolidated Fund : Provided that no Owner, Lessee or Occupier of, or other Person interested in any such Legal Quays or other Premises, should be compelled to dispose of his Estate and Interest in the same, unless

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the whole of his Property therein should be purchased
Sect. 110.

No Purchase was made by the Lords of the Treasury
in pursuance of the power given to them by the before-
mentioned Act.

By the 43rd Geo. 3rd, chap. 124, intituled: "An Act
to authorize the advancement of further Sums of Money
out of the Consolidated Fund to be applied in the im-
provement of the Port of *London*, by the Mayor, Alder-
men and Commons of the City of *London* in Common
Council assembled, and to empower the Lords Commis-
sioners of His Majesty's Treasury to Purchase the
Legal Quays between *London Bridge* and the *Tower*
London," after reciting (among other things) the Act
making The *West India Docks*, (39 Geo. 3d, chap. 61)
and also the before-mentioned Act, and that it was
expedient that the power given, by the former Act,
to the Lords of the Treasury, should be revived and con-
tinued, and that they should be required to purchase
the Legal Quays within a limited time: It was enacted
that it should be lawful for the Lords of the Treasury
for the time being, and they were thereby required
within three years next after the passing of the now sta-
ting Act, to purchase of the several Owners, Lessees and
Occupiers of all or any of the Legal Quays and War-
houses, Buildings and other Works annexed there-
to or usually occupied or employed therewith, situate be-
tween *London Bridge* and the *Tower of London*, or any
part or parts thereof, their several and respective Estates
and Interests of and in the same Premises respectively,
and that it should also be lawful for the Lords of the
Treasury for the time being, and they were thereby
authorized, in case they should deem it expedient,

purchase any Dwelling-houses, Warehouses, Buildings or Premises situate adjoining to any such Legal Quays, Warehouses, Buildings or other Works aforesaid, and, for the purposes aforesaid, all the Powers, Authorities, *Provisions, Regulations, Directions, Clauses, Penalties, Forfeitures, Matters and Things in the Act of the 39th and 40th years of his said late Majesty contained, relating to any such legal Quays, Warehouses, Buildings or other Works, or the purchasing thereof*, or in the recited Acts of the 39th year and the 39th and 40th years of his said late Majesty contained, authorizing and empowering Bodies Politic, Corporate or Collegiate, or Corporations aggregate or sole, Tenants for Life or in Tail, or other Persons having qualified or partial Estates or Interests, or Husbands, Feme Coverts, Guardians, Trustees, and Feoffees in Trust for Charities or other purposes, Committees, Executors or Administrators or any other Persons whatever under any incapacities or disabilities, on behalf of themselves or others, to treat and to compel any such Corporation or Persons to treat and agree for the Sale of any Houses, Buildings, Lands, Tenements, or Premises, *or in any wise relating thereto*, or for ascertaining the value of any such Premises, in case of any refusal or inability to treat, or for completing any such Purchases, or obtaining Possession of any such Premises, *or any other matter or thing relating thereto*, should, as far as the same were applicable or could be applied, extend and be construed to extend to the now stating Act, and should operate and be in force in respect to the same Act, and the purposes of enabling The Lords of the Treasury to complete the Purchase of the said Legal Quays, and Warehouses, Buildings, or Works aforesaid, or any Dwelling-houses, Warehouses, Buildings, or other Premises adjoining thereto, as fully and effectually, to all intents and purposes, as if the same

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Powers, Authorities, Provisions, Regulations, Directions, Clauses, Penalties, Forfeitures, Matters and things were particularly repeated and re-enacted in the body of the now stating Act.* Sect. 8.

Provided, That all or any of such Legal Quays, Warehouses, Dwelling-houses, Buildings, and also all Goodwill or other matters relating to the same, should be estimated according to what the same would have been worth if the several Improvements intended or carried into execution under either of the recited Acts, or of the now stating Act, had not been in contemplation. Sect. 9.

That all Sums of Money to be paid for any such Legal Quays, Warehouses, Dwelling-houses or other Buildings, as also for Goodwill or any other matter relating to the same, should be respectively paid within Six Months after the respective Prices or Sums of Money to be paid or given for the same respectively, should have been agreed upon or ascertained, by the Verdict of any Jury, pursuant to the provisions of the Act of the 39th and 40th Geo. 3d. or of the now stating Act. Sect. 10.

That all the Powers, Authorities, Provisions, Regulations, Directions, Fines, Penalties, Forfeitures, Clauses, Matters, and things whatsoever, in the first recited Act contained, in relation to the Rates and Duties thereby

* The 39th Geo. 3, c. 69, contained Clauses, similar to those in the 39th and 40th Geo. 3, c. 47, enabling incapacitated Persons to convey their Lands to *The West India Dock Company*, and directing the Purchase-money to be reinvested in the purchase of other Lands: but it contained no direction whatever as to the payment of the Expenses of such reinvestment.

granted, or the levying, recovering, collecting, receiving, taking, paying, and accounting for the same, or in relation to any other Act, matter or thing whatever, should, so far as the same or any of them were applicable to the Rates and Duties granted by the now stating Act, or to any other of the purposes thereof, and not thereby repealed, altered, or otherwise provided for or rendered unnecessary, extend and be construed to extend to the Rates and Duties by the now stating Act granted, and to all the other purposes thereof, and should operate and be in force in respect to the said Rates and Duties and other purposes of the now stating Act, according to the true meaning thereof, as fully and effectually, to all intents and purposes, as if the same Powers, Authorities, Provisions, Regulations, Directions, Fines, Penalties, Forfeitures, Clauses, Matters and things, were particularly repeated and re-enacted in the body of the now stating Act. Sect. 12.

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The *Fishmongers' Company* being seised in Fee of one of the Legal Quays between *London Bridge* and the *Tower*, called *Porter's Quay*, The Lords of the Treasury authorized the Commissioners of Customs to treat with them for the purchase thereof; but the Parties not being able to agree, the Price was assessed by a Jury, in May 1805, at 35,000 *l.*: and, in 1806, that Sum was in pursuance of the provisions of the Acts of the 39th & 40th & 43d Geo. 3d paid into the Bank and invested in the purchase of 59,000 *l.* Consols.

Between 1827 and 1833 The *Fishmongers' Company*, in compliance with the directions of the last-mentioned Acts, entered into several Contracts for the Purchase of Messuages and other Hereditaments; and, between 1828 and 1833 parts of the Stock were sold and the

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Proceeds paid to them, to enable them to complete Purchases. In June 1834, they presented a Petition submitting that, under the true construction of the provisions and enactments of the before-men-
 Acts, The Lords of the Treasury ought to pay to the Expenses of those Purchases, and praying Reference to The *Master* to ascertain the Amount of reasonable Expenses incurred by them in the execution of the Purchases, and that The Lords of the Treasury might be ordered to pay the Amount to The Petition now came on to be heard.

Sir *E. Sugden* and Mr. *John Romilly* &
 Petitioners :

The Act of the 39th & 40th Geo. 3d was passed for two purposes, namely, for the construction of the London Docks, and for enabling The Lords of the Treasury to purchase the Legal Quays. The 43d Section of that Act directs that where, by reason of any disability or Incapacity of the Persons or Corporations entitled to any Lands to be purchased under the Act, the Purchase-money shall be required to be paid to the Court of Chancery and to be applied in the purchase of other Lands to be settled to the like Use, in pursuance of the Act, it shall be lawful for the Court of Chancery to order the Expenses of all Purchases made in pursuance of the Act, to be paid by The Dock Company. The Act contains no express direction regard to the Expenses of reinvesting Purchase-money paid by The Lords of the Treasury. But we consider that the 43d Section applies to The Lords of the Treasury as well as to The Dock Company : and that, whenever a Party is compelled to part with his Estate for the benefit of the Public, and the Estate is so circumstanced that the Purchase-money must be reinvested

under the direction of the Court of Chancery, in the purchase of other Estates, the Costs of the reinvestment are to be borne by the Public.

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By the 43d Geo. 3d, chap. 124, that which before was optional, was rendered imperative; for The Lords of the Treasury were thereby *required* to purchase the Legal Quays. By the 8th Sect. of that Act, all the Powers, Provisions, Regulations, Clauses, Matters and Things in the former Act, relating to Purchases in any way, are embodied in the subsequent Act, in order to enable The Lords of the Treasury to carry it into execution. By the former Act, the Purchasers, where there was only a liberty to purchase, were to pay the Expenses of the reinvestment; but, where it was rendered imperative on the Treasury to buy, there was a stronger reason why they should pay those Expenses. These Acts do not anticipate that any benefit is to be obtained by the Seller. If he sells one Estate, he is to buy another; therefore, it is a mere change of Property for the convenience of the Public, and that change is to be made at the Expense of the Public.

The *Solicitor-General* and Mr. *Wray* for The Lords of the Treasury:

The Lords of the Treasury are only anxious to do their duty in the character of public Trustees; and, if your *Honor* should think that you have jurisdiction to make the Order sought by this Petition, and that it is fit you should make such an Order, they can have no objection to make the payment out of the Consolidated Fund. It appeared, however, to those who advised The Lords of the Treasury, that The Court has no jurisdiction to make such an Order.

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The main object of the 39th & 40th Geo. 3, was to authorize the formation of the *London Docks*; and by the 43d section of that Act, The Dock Company were directed, in certain cases, to pay to parties from whom they might purchase Lands or Houses, the Expenses of reinvesting the Purchase-moneys. The Act contains 109 Clauses relating to the formation of the Docks, and then there follows the Clause, which gives rise to the present question; that Clause, however, has nothing whatever to do with the making of the Docks. If under that Section, The Lords of the Treasury had bought the Legal Quays belonging to The *Fishmongers' Company*, could it be contended that the Court had any authority to order them to pay the Expenses incurred by The *Fishmongers' Company*, in reinvesting the Purchase-money? We say that no such authority was given by the 39th & 40th Geo. 3, and therefore, it was not given by the subsequent Act; for no power is given by the latter Act, that was not given by the former. Now the latter Act enacts: "That it shall be lawful for The Lords of the Treasury and they are hereby required" &c. It was said that those words made it imperative on The Lords of the Treasury to purchase the Legal Quays: but that is not the right construction. All that the Legislature intended was to *authorize* The Lords of the Treasury to purchase the Legal Quays in case they should think it beneficial to the Public so to do, and to limit the time within which the purchases were to be made. There is nothing in the 39th and 40th Geo 3, relating to the payment of the Expenses of reinvesting the Money paid for the purchase of the Legal Quays: and all that was meant by the general words in the 8th Section of the 43d Geo. 3, was that all the provisions in the former Act, relating to the sale and purchase of the Legal Quays, should extend to the sale and purchase of the

Legal Quays authorized to be made during the further term of three years.

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Sir *E. Sugden* in reply :

It was said that the purchase of the Legal Quays, had no connection with the main object of the 39th & 40th Geo. 3. But, both the objects of that Act were connected with the public Revenue of the Country: and it was considered that, if The Lords of the Treasury were authorized to purchase some of the Legal Quays, it might have the effect of preventing Claims being made for excessive Compensation on account of the damage that might be done by the establishment of the Docks. It is impossible to look at this Act without seeing that the intention was that all the powers, and all the provisions with regard to the purchases by one body, should apply to the purchases by the other: and I confidently submit that, if that Act had stood by itself, The *Fish-mongers' Company* would have been entitled to be paid the Expenses of the reinvestment. Then the 43 Geo. 3. recites that it is expedient that the power given to The Lords of the Treasury should be revived and continued, and that they should be *required* to purchase the Legal Quays within a limited time: and, taking that recital in connection with the enacting part of the Act, it is clear that The Lords of the Treasury were *bound* to buy all the Legal Quays between *London Bridge* and the *Tower*, within the term of three years. Then the Act having made it compulsory upon the Treasury to buy the Quays, says that the value of them shall be estimated according to what the same would have been worth if the several Improvements intended or carried into execution under any or either of the Acts, had not been in contemplation. As, therefore, the owners of the Quays are to get no benefit from the Acts, it is but

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reasonable that they should not pay the Expenses of the reinvestment. Besides, under this latter Act, The Lords of the Treasury were empowered to purchase any Dwelling-houses or other Buildings adjoining the Legal Quays. So that the same option or power was given to them as The Dock Company had under the former Act: and, in the subsequent part of the very Clause in which that option or power is given, it is enacted that for the purposes aforesaid all the Powers, &c. of the recited Acts shall extend to that Act.

The VICE-CHANCELLOR:

19th Nov.

The Question which was raised on this Petition, depends upon the construction of several Acts of Parliament.

By the 39th Geo. 3, c. 69, The *West India Dock Company* were authorized to make Purchases of certain Lands for the general purpose of constructing the Docks; and, by Section 25, Directions were given for the investment of the Purchase-money where Tenements had been purchased from incapacitated Persons: and the Purchase-money was directed to be laid out in the purchase of other Tenements, in such manner as the Court of Chancery should think just. That Section does not, neither does any other part of the Act, point out how the Expenses of the reinvestment were to be paid.

After the passing of that Act, The Act of the 39th and 40th Geo. 3, c. 47, was passed; and thereby power was given, to The *London Dock Company*, to make purchases of Lands in a manner similar to that in which, by the former Act, The *West India Dock Company* were enabled; and directions were given for the reinvest-

ment of the Purchase-mones of Tenements which had been purchased from incapacitated Persons; and, by Section 43d of that Act, it was expressly provided: That where, by reason of any incapacity or disability of the Person or Persons entitled to any Lands to be purchased under the Authority of the Act, the Purchase-money should be required to be paid into the Court of Chancery and be applied in the purchase of other Lands to be settled to the like Uses, in pursuance of that Act, it should be lawful for the Court of Chancery to order the Expenses of all Purchases, from time to time to be made in pursuance of the Act, or so much of such Expenses as the Court should deem reasonable, to be paid by the said Company, who should, from time to time, pay such Sums of Money for such purposes as the Court should direct. It seems but consonant to natural justice that the Tenements to be subsequently purchased, should be of the same value as the Tenements purchased by the Company, which was authorized, in a compulsory way, to make the purchase.

Then the same Act of Parliament, after making Provisions which solely regard The *London Dock Company*, by the 110th Section, gave power to The Lords of the Treasury to purchase The Legal Quays, and it contains several general terms of reference to the mode in which the Purchase was to be accomplished; but says nothing with respect to the disposition of the Money to be paid by The Lords of the Treasury for purchasing the Quays.

That Act authorized The Lords of the Treasury to make those Purchases within the period of two years; and then, the 43d Geo. 3. recites, both the *West India Dock Act* and the *London Dock Act*, and that particu-

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lar portion of the *London Dock* Act which gives power to The Lords of the Treasury to purchase the Legal Quays, and also that it was expedient that the said power (which is the power of purchasing the Legal Quays) should be revived and continued, and that The Lords of the Treasury should be required to purchase the Legal Quays within a limited time: and then it proceeds to give directions with regard to the *West India Dock* Act and the *London Dock* Act; and then, by the 8th Section, it is enacted: "that it shall be lawful for The Lords of the Treasury for the time being, and they are hereby required, within the period of three years next after the passing of the Act, to purchase, of the several Owners, Lessees or Occupiers, the Legal Quays, and, for the purposes aforesaid, all the Powers, Authorities, Provisions, Regulations, Directions, Clauses, Penalties, Forfeitures, Matters and Things in the Act of the 39th & 40th Geo. 3. contained relating to any such Legal Quays or the purchasing thereof, or in the 39th or 39th & 40th Geo. 3. contained authorizing the Owners of purchased Premises to make the Conveyances, or in anywise relating thereto, or for ascertaining the value of any such Premises in case of any refusal or inability to treat, or for completing any such Purchases, or obtaining possession of any such Premises, or any other matter or thing relating thereto, shall, so far as the same are applicable or can be applied, extend and be construed to extend to this present Act, and shall operate and be in force in respect to this Act, and the purposes of enabling the Lords Commissioners to complete the Purchases of the said Legal Quays, Warehouses &c., as fully and effectually, to all intents and purposes, as if the same powers &c. were particularly repeated and re-enacted in the body of this Act."

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Now it is quite obvious that the Persons who passed this Act of Parliament, had before them the former Act of the 39th and 40th Geo. 3d : And it is plain that it was defective in respect of not making some Provision, either generally or by express enactment, with regard to the mode in which the Purchase-monies to be paid by The Lords of the Treasury, should be reinvested ; and, in my Opinion, these words : “ or any other matter or thing relating thereto,” would, of themselves, have had the effect of embodying, *mutatis mutandis*, in this Act of the 43d Geo. 3, those provisions which were contained in the first part of the *London Dock Act*, with regard to *The London Dock Company*. But then there follows the 12th Section, by which it is enacted : “ That all the Powers, Authorities, Provisions, Regulations, Directions, Fines, Penalties, Forfeitures, Clauses, matters and things whatsoever, in the said first hereinbefore recited Act contained, in relation to the said Rates and Duties thereby granted, or the levying, recovering, collecting, receiving, taking, paying and accounting for the same, or in relation to any other Act, matter or thing whatsoever, shall, so far as the same or any of them are applicable to the Rates and Duties granted by this Act, or to any other of the purposes thereof, and not hereby repealed, altered or otherwise provided for or rendered unnecessary, extend and be construed to extend to the Rates and Duties granted by this Act, and to all the other purposes thereof, and shall operate and be in force in respect to the said Rates and Duties and other purposes of this Act, according to the true meaning of this Act, as fully and effectually, to all intents and purposes, as if the same Powers, &c. were particularly repeated and re-enacted in the body of this Act.”

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Now, though this Section applies to the *India Dock* Act, yet, by general words, every species of compulsory process which was given by the Act, is clearly intended to be re-enacted for the purposes of this Act of the 43d Geo. 3. And although the 12th Section of that Act does not refer to the 39th or 40th Geo 3, yet I think that there should be as extensive a construction at least, given to the general words of reference in the 8th Section, as, it is manifest, is meant to be applied to the 12th Section. And, on the whole, I am of Opinion that the general terms used in the Act of the 43d Geo 3. do authorize The Court of Chancery to direct that The Lords of the Treasury shall pay the reasonable Expenses of reinvesting the Purchase-monies, which were paid to The *Fishmong Company* for the Legal Quays purchased from them.

* Affirmed by The Lords Commissioners.

IN RE STANLEY.†

1836.
14th November.

THE Petition (reported *ante* Vol. 5, page 320,) was again placed in the Paper: And The *Vice-Chancellor* on being referred, by Mr. *Booth*, to *Ex parte Wharton* (a), made the Order.

† Ex Relatione.

(a) 1 Keen, 278.

MEMORANDUM.

The Decree in *Wharton v. Lord Durham*, reported *ante*, Vol. 5, p. 297, was affirmed by Lord *Brougham* (see 3 Myl. & Keen, 472), but was reversed, by the House of Lords, in August 1836.

CASES IN CHANCERY,

BEFORE THE

VICE-CHANCELLOR.

JENKINS v. BRIANT.

1834 :
12th November.

THE Receiver in this Cause having died, the Plaintiffs presented a Petition, praying that his Executors might be ordered to bring in and pass his Accounts, and pay the balance to be found due, out of his Assets.

Receiver.

The Court has no jurisdiction to order, in a summary way, the Executor of a deceased Receiver to bring in and pass his Testator's Accounts, and pay the Balance to be found due, out of the Assets.

Sir *E. Sugden* in support of the Petition.

Mr. *Garratt* and Mr. *O. Anderdon* *contrà*.

The *Vice-Chancellor* said that he had no jurisdiction to make the Order, and dismissed the Petition with Costs.

1834 :
17th November.

LAYFIELD v. LAYFIELD.

*Account.
Executor
de son Tort.*

Payments made by an Administrator *de son Tort*, pending a Suit for an Account of an Intestate's Estate, to a person who took out Administration after the institution of the Suit and was thereupon made a Co-defendant, will not be allowed.

THE Bill was filed for the usual Accounts of an Intestate's Estate, against *Thomas* and *John Layfield*, who had possessed part of the Intestate's Assets without having taken out Administration to him. Afterwards *Robert Layfield*, the Father of *Thomas* and *John*, took out Administration to the Intestate, and, thereupon, was made a Defendant. Pending the Suit but before the Decree, the Sons paid, to their Father, certain Sums on account of the Assets possessed by them. On taking the Accounts directed by the Decree, the *Master* refused to allow them those payments; upon which they excepted to the Report.

Mr. *Ching*, in support of the Exception, referred to *Perry v. Phelps* (a) and *Maltby v. Russell* (b).

Mr. *Knight* and Mr. *Parker*, in support of the Report, contended that the Cases cited had no application and that, as the Payments were made pending the Suit, the *Master* was justified in disallowing them. They referred to *Padget v. Priest* (c), *Curtis v. Vernon* and *Oxenham v. Clapp* (e).

The VICE-CHANCELLOR :

The Payments were made, in the course of the Cause, by the Sons to their Father, who, in the course of the Cause, became the Administrator of the Intestate. If such a transaction were allowed, a Court of Equity would exist for no useful purpose : and, therefore, I overrule the Exception.

(a) 10 Ves. 34.

(b) 2 Sim & Stu. 227.

(c) 2 T. R. 97.

(d) 3 T. R. 587.

(e) 2 Barn & Adol. 305.

HAWKINS v. HAWKINS.

THIS was a Suit for the Administration of the Estate of the late Sir *Christopher Hawkins*, who, by his Will dated the 28th of January 1823, after devising his Freehold Estates, subject to the payment of his Debts and Legacies, to the Plaintiff for life, with divers Remainders over, gave to his Sister, *Mary Trelawny Brereton*, and to her Son, *Harry Brereton Trelawny*, Esq., the Sum of 12,000 l., in Trust only and for the Use and Benefit of his adopted Daughter, *Christiana Dutton*, then aged about 18 years, which Sum of 12,000 l. the Testator desired might be paid to her the said *Christiana Dutton*, and to be settled on her, during her said life, at the time of her Marriage; or in case if that she did not Marry, then the Interest of the said Money, being vested in Government Securities, to be paid to her; and, in the event of her *not marrying or dying*, then the said Sum of 12,000 l. to be divided in equal Parts, and one half to be paid to *Harry Brereton Trelawny* or his Heirs, and the other Part, to the Testator's Nephew, *John Trelawny*, or his Heirs, or the Heirs of either; in default, to the Heirs of the Testator's Brother, *John Hawkins*.

1834:
11th 18th &
19th November.

Settlement.
Construction.
Next of Kin.

By a Marriage Settlement, a Fund, the property of the Wife, was settled on her and her Husband and their Issue, and, in default of Issue, on the Wife's Next of Kin. The Wife, who was illegitimate, died without Issue, and her Husband administered to her. Held that the Crown was not entitled to the Fund; but that it belonged to the Husband as Administrator to his Wife.

Will. Construction.—Testator gave a Sum of Money to Trustees, in Trust only and for the use and benefit of his adopted Daughter, and which he desired might be paid to her, and to be settled on her during her Life, in case of her Marriage: or, in case she did not Marry, then the Interest of the Money, being vested in Government Securities, to be paid to her: and, in the event of her *not marrying or dying*, then the Money to go to his Nephews. The Daughter married, and, shortly afterwards, died without Issue. Held that her Husband, who had taken out Administration to her, and not the Testator's nephews, was entitled to the Fund.

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 v.
 HAWKINS.

The Testator, by a Codicil dated the 28th of April 1825, gave to *Christiana Dutton*, 8,000 *l.*, in addition to the above Sum of 12,000 *l.*, and directed that, in case he had no legal Issue, the above Sum of 8,000 *l.* additional should be paid to her on his decease.

The Testator died in April 1829, without Issue. On the 26th of January 1832, Miss *Dutton* (who was illegitimate Child) married *Henry Trehitt*. By the Settlement made previous to their Marriage, after reciting that Miss *Dutton* was or claimed to be entitled to the Sum of 12,000 *l.* under the Will of Sir *Christoph Hawkins*, it was agreed that that Sum should be held by the Trustees of the Settlement, in Trust, during the joint Lives of *Henry Trehitt* and *Christiana Dutton* for the separate Use of *Christiana Dutton*, and, in case she should survive *Henry Trehitt*, in Trust for her for the remainder of her life, and, if *Henry Trehitt* should survive her, then for him for life, and, after the decease of the Survivor of them, in Trust for their Issue; and, in case there should be no Issue of the Marriage, *Christiana Dutton* should obtain a vested Interest in the 12,000 *l.*, then *Christiana Dutton* should die in the lifetime of *Henry Trehitt*, in Trust for such Person or Persons as she should, by Will, appoint, and, in default of such appointment, in Trust for the Person or Persons who according to the Statutes for the Distribution of the Estates of Intestates, would, at the time of such failure of Issue as aforesaid, be *Next of Kin of Christiana Dutton* if she had died without having been married to be divided between and among such Persons, if more than one, in the Shares and manner prescribed by such Statutes for the Distribution of Estates of Intestates, but if *Christiana Dutton* should survive *Henry Trehitt*

then in Trust for her, her Executors, Administrators and Assigns.

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v.

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On the 12th of September 1832 *Christiana Trehitt* died without Issue, and without having made any Testamentary disposition under the Power reserved to her by the Settlement, and her Husband, who had taken out Administration to her, presented a Petition in the Cause, praying that he might be declared to be entitled, as her Administrator, to the 12,000 *l.* and 8,000 *l.*

The Petition was served upon *Harry Brereton Trelawny*, *John Trelawny* and the Parties in the Cause. On the Petition being called on, it was suggested that, as Mrs. *Trehitt* left no Next of Kin, the Law Officers of the Crown ought to have been served; and the Petition was ordered to stand over for the purpose of serving them; which was accordingly done.

Mr. *Knight* and Mr. *Campbell*, for the Petitioner:

18th Nov.

We will first dispose of the question with the Crown, which arises on the Limitation, in the Settlement, to the Next of Kin of Mrs. *Trehitt*. The 12,000 *l.* was the Personal Estate of Mrs. *Trehitt*. The Interest limited, by the Settlement, to her Next of Kin, either remains undisposed of, or reverts to her; and the Crown cannot claim it; but it goes to her Personal Representative. *Smither v. Willock* (a).

The *Solicitor-General* and Mr. *Wray*, for the Crown:

If there had been any Next of Kin of Mrs. *Trehitt*, the Fund would have gone to them: but, there being

(a) 9 Ves. 233.

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none, the Crown takes. It is in the nature of *bono vacantia*.

It is clear that the Husband and Wife intended, by their Contract, to divest themselves of all beneficial Interest in the Fund, except that which was expressly limited to them. The Husband has, certainly, excluded himself from taking beneficially: and, as the whole Interest is divested and given to Parties who do not exist, the Crown is entitled to the Fund. *Middleton v. Spicer (b)*.

THE VICE-CHANCELLOR:

The Crown has no right to the Fund as against the Husband. He was intended to be excluded in favour only of such Next of Kin as there might be; and, as there were no Next of Kin, the Title of the Wife was unaffected by the Settlement, and the Fund resulted to her, and goes to her Husband as her Personal Representative.

19th Nov.

Mr. Knight and Mr. Campbell:

The remaining question is whether, on the death of Mrs. Trehitt, H. B. Trelawny and John Trelawny became entitled to the 12,000*l.* under the Gift over by the Will. The Testator gives the 12,000*l.* to Trustees in trust only and for the use and benefit of his adopted Daughter, and desires it to be *paid* to her. He then contemplates her marrying, and directs how the Fund is to be settled. He meant, however, not to abridge her Interest, but merely to protect her against her Husband. Her death is spoken of as a contingency, and means, dying in the lifetime of the Testator. Or if

(b) 1 Bro. C. C. 201.

word 'or' may be read as 'and'; in which case the Gift over has not taken effect, as Mrs. *Trehitt* did not die unmarried. The Codicil throws light on the Will: it contains an absolute Gift of the 8,000 *l.* *Adamson v. Armitage* (c).

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Sir *E. Sugden* and Mr. *Simons* for *H. B. Trelawny*
and *John Trelawny*:

Recourse cannot be had to the Codicil for the purpose of construing the Will; for it does not operate on the Fund in question. Mrs. *Trehitt* was the Testator's adopted Daughter, and the Testator expressly directs the Fund to be settled on her during her life, and, on her dying, he gives it to his Nephews.

Mr. *Sidebottom* for the Plaintiff.

Mr. *Jacob* for the Defendants.

THE VICE-CHANCELLOR:

The intention of the Testator, though not technically expressed, is sufficiently apparent. He first gives the sum of 12,000 *l.* to his Sister and her Son, in trust only and for the use and benefit of his adopted Daughter. Those words would give her the absolute Interest in the Money. He then desires that it shall be paid to her and settled on her, during her life, at the time of her Marriage. These latter words and those that precede them, must be considered as forming one sentence; and the Testator meant by them, that, on the Marriage of his adopted Daughter, a Life-interest should, at all events, be secured to her. He next prescribes what is to be done with the Money in case she does not marry;

(c) 19 Ves. 416.

1872
 H. C. C. C.
 H. C. C. C.

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 ...ng to *Adamson v. Arm*
 ... of the Interest of a
 ... Then follow these words: "
 ... *Christiana Dutton* not mar
 ... must have meant: "in the

... the Petitioner entitled to
 ... the 8,000 *l*.

FRANCIS H. HARDING.

... *Francis Harding*, who resided
 ... the 7th and Representative of the
 ... Settlement dated in 1786, w
 ... *Francis, Thomas and Eliza J*
 ... sums of Stock, subjec
 ... Mother, *Fanny Macdon*

... 1827. *Francis Macdonnell*,
 ... wrote a letter to the

... formed the Ces
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tenant *Fisher*, (who was Mrs. *Harding*'s Solicitor, and resided at *Newport* in *Shropshire*), which was partly as follows: "On the part of myself and my Brother and Sister, who are, jointly with myself, entitled to the Reversion of the Stock mentioned in the other half, I beg leave to propose to you, as the Solicitor of Mrs. *Harding*, that the same should be sold out and the produce invested in a good Mortgage. If you find any difficulty in procuring such a Security, I have no doubt I could do so in this neighbourhood: but I have no desire to interfere in the transaction; my object in the suggestion being to avoid any loss in the Capital to which we might be subjected by a fluctuation in the Funds. My Mother's income would be, also, considerably increased; and I hope, therefore, that neither she or yourself will object to comply with our wishes.—*P. S.* It may be as well to mention to you that my Sister's share has been assigned to me in consideration of 800 *l.* paid to her in 1811, and an Annuity of 10 *l.* for her life, from that time, which has been regularly paid to her since that time. She will, however, readily concur in any act that I may approve of and that you may think necessary."

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Several other Letters passed between *Francis Macdonnell* and *Fisher*: and, in January 1830, *Fisher* having obtained the necessary Powers of Attorney through Messrs. *Sansom & Co.*, his London Bankers, and having procured them to be executed by Mrs. *Harding*, the Stock was sold, and produced 2,076 *l.* 15 *s.* 10 *d.* A few days afterwards, 1,500 *l.*, part of that Sum, was invested on a Mortgage in Mrs. *Harding*'s name; and the Balance, amounting to 576 *l.* 15 *s.* 10 *d.*, remained in *Fisher*'s hands.

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On the 23d of February 1830, *Fisher* wrote to *Francis Macdonnell*, from *Newport*, as follows: "On the other side I send you a Copy of the Stock-broker's Account of the Stock standing in Mrs. *Elizabeth Harding's* name, as the Executrix of Dr. *Goodinge*, the surviving Trustee of your Mother's Trust Fund. Fifteen Hundred Pounds of the money has been invested on the Security of a Transfer of a Mortgage to that extent, upon an Estate of *Wm. Lloyd Jones, Esq.*, in *Denbighshire*. I am under a Treaty with other persons as to the investment of the remainder, and I will inform you of the result: in the mean time, that Money remains in my hands, and I will allow Two-and-a-half per Cent. for it, the same as the Bankers here allow on deposits."

In September 1830, *Fanny Macdonnell*, the Mother of the Plaintiffs and the Tenant for Life under the Settlement, died, and, shortly afterwards, *Francis Macdonnell* communicated that event to *Fisher* and Mrs. *Harding*, and requested a Transfer of the Trust Fund. On the 1st of November 1830, *Fisher* wrote, to *Francis Macdonnell*, as follows: "I informed you that 1,500 *l.* had been invested, by Mrs. *Harding*, on the Security of a Mortgage of an Estate in *Denbighshire*. There is a second Mortgagee, who is willing now to advance this 1,500 *l.*, if you wish to have the Money in preference to a Transfer of this Security." On the 6th of November, *Francis Macdonnell* wrote, in reply, as follows: "I shall be obliged to you to expedite the Transfer as much, and to let it be with as little expense as you can. I have an opportunity of investing 3,000 *l.* at Seven-and-a-half per Cent. which I should not like to lose, and, therefore, I would rather take the 1,500 *l.* in cash. My

Brother and Sister will leave the settlement of the business to me. I have, long since, purchased the interest in my Sister's Share; and I have arranged, lately, with my Brother, to give him 10 *l.* per Cent. for his life, upon his Share." On the 16th of December 1830, *Fisher* wrote, to *Francis Macdonnell*, as follows: "I have delayed writing to you, from not being able to obtain a final answer of my Client, as to the time when he would advance the 1,500 *l.* on the Security placed in *Mrs. Harding's* name with part of your Trust Fund. He has now fixed to do so about the 16th of January; and, in the mean time, in a few days, that matter being arranged, I will send you the Draft of the proposed Release of the Trust."

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On the 21st of January 1831, the Mortgage was transferred, by *Mrs. Harding*, to the Rev. *John Nanney*, who, thereupon, gave to *Fisher*, two Bank Post Bills for 1,000 *l.* each, and received back from *Fisher* 500 *l.* On the same day, *Fisher*, who knew that *Francis Macdonnell* was then staying in *London*, transmitted to him an Account, purporting to be between the Plaintiffs and *Mrs. Harding*, in respect of the Trust, together with his Bill of Costs relating thereto, headed: "*Mrs. Elizabeth Harding to Robert Fisher Dr., In re Macdonnell,*" and also the Draft of a Release from the Plaintiffs to *Mrs. Harding*, for the perusal of *F. Macdonnell* on behalf of himself and his Brother and Sister. On the following day, *Fisher* remitted the Bank Post Bills to *Sansom & Co.*, and wrote to them as follows: "I enclose you two Bank Post Bills for 1,000 *l.* each, to be placed to my credit. I shall be obliged to you to acknowledge the receipt by return of post. This Money will be wanted to pay over to a *Mr. Macdonnell* in a few days, probably."

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Sansom & Co. placed the amount of the Bank Post Bills to the credit of *Fisher's* Account current with them.

On the 3d of February, *Fisher* sent a Letter to Mr. *F. Macdonnell*, to this effect: "On the 21st ult., I sent, in a parcel from hence, per Albion *Chester* coach which goes to the *Bull and Mouth* Inn, the Draft of a proposed Release to Mrs. *Harding*, and also her Cash Account, directed to you at *Will's* Coffee-house, *Lincoln's-Inn*; which I fear has not got to your hands, or I should have heard from you ere this. As the Money balance is lying idle at *Sansom & Co.'s*, I am anxious that this matter should be concluded. I have addressed a similar Letter to you at *Usk*, in case you should have left *London*." On the 15th of February, that Letter was answered by *Francis Macdonnell* (who had then returned to *Usk*) as follows: "I have had your Deed of Release engrossed, and sent it to my Sister for her signature. When she returns it, I will send it to my Brother, and, when he returns it, I will forward it to Mr. *White*, of *Lincoln's-Inn*, my Agent, to be exchanged for the Money. I do not like to make observations on your Bill of Costs; but I think, at any rate, the expense of the Assignment to Mr. *Narney*, should not be charged to us, nor should the Release have been prepared by any person but myself, as I am in the Profession, according to the usual etiquette. We are also entitled to 4l. per cent. on the Balance over the 1,500 l.: but, not to be particular, I have no objections to receive 2,110 l. full. Be so good as to let me hear from you. I have written to you before, but I have been too busy to attend to business.—P. S. I never had any Instrument from my Brother; and my Sister's was an executory Instrument. I have thought it

therefore, to take no notice of it, and that they should be Parties." On the 19th of February, *Fisher* wrote to *F. Macdonnell* a Letter, in which he objected to pay more than 2,100 *l.*, and added: "On hearing from you that the Assignment is completely executed and returned to *Mr. White*, I will write to my Agent, with an order on *Sansom & Co.*, directing them to pay, to the check of any person whom you may name, the sum of 2,100 *l.* in exchange for the Release."

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Francis Macdonnell having forwarded the Release to *Eliza Macdonnell*, who resided in *Dorsetshire*, and to *Thomas Macdonnell*, who resided at *Birmingham*, and they having executed it and returned it to him, he executed it himself; and, on the 7th of March 1831, wrote to *Fisher* as follows: "I have had the Deed executed: and, by to-morrow's post, I shall send it to *Mr. Thomas White* of *Lincoln's-Inn*, my Agent, that it may be exchanged for the Money. You will be pleased therefore to instruct your Agents, Messrs. *Alban & Co.*, accordingly. I understood from you that the Sum is to be 2,100 *l.*, and I am sorry that, all circumstances considered, you have not acceded to my proposal of making it 2,110 *l.*"

On the same 7th of March, *Sansom & Co.* stopped payment; and they were afterwards declared Bankrupts. At the time of their stopping payment, the Balance due on *Fisher's* general Account current with them, was 2,145 *l.* On the 8th of March, *Fisher* wrote to *Francis Macdonnell* the following Letter: "I have been much hurt to-day by the arrival of the unexpected news of Messrs. *Sansom & Co.* having yesterday stopped payment; and, at present, no Information has been given

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of the cause or probable consequences to the Creditors. I shall write to *London* to-night, to make Inquiries about it, and I will let you know the result. It is most unfortunate that the Execution of the Release should have been so long delayed, or you would have had the Money out from their hands. Neither Mrs. *Harding*, as a mere Trustee, or I, as her Solicitor, are in any way responsible for this unfortunate Failure, and we shall take your Direction what to do in respect of the 2,100 *l.* Debt."

Francis Macdonnell afterwards wrote several Letters, to Mrs. *Harding* and to *Fisher*, in which he threatened to file a Bill against Mrs. *Harding*, if she refused to pay the 2,100 *l.*, and said that he should consider her as alone liable for the Loss, and that all his former Communications were made to *Fisher*, as her Solicitor only.

However, in Easter Term 1831, the Bill was filed against both Mrs. *Harding* and *Fisher*, charging that the 2,000 *l.* was remitted, by *Fisher*, to *Sansom & Co.*, by the Order or with the privity of Mrs. *Harding*, without any specific Direction to place the same to a separate Account, or giving any special Direction in respect thereof; but, having been paid in as *Fisher's* Monies, was carried, by *Sansom & Co.*, to his general Credit in his Account current with them: that the 2,100 *l.* which was alleged to have been in the hands of *Sansom & Co.* was merely part of *Fisher's* general Balance, and was not in any manner distinguished therefrom; and no specific payment or appropriation was ever made of a Sum of 2,100 *l.*, to answer the Plaintiff's demand, and the Firm had no notice that any part of *Fisher's*

Monies in their hands, was subject to any Trust, nor was there any privity between them and the Plaintiffs. The Bill prayed that *Fisher* might be declared to be liable to pay the 576 *l.* 15 *s.* 10 *d.* retained by him as before-mentioned, with Interest, and that either Mrs. *Harding* or *Fisher* might be declared to be liable to pay the Remainder of the 2,100 *l.* with Interest.

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Mrs. *Harding*, in her Answer, admitted that the 2,000 *l.* was paid to *Sansom & Co.* with her privity and consent; but she said that *Francis Macdonnell* was guilty of laches in not sooner executing the Release and withdrawing the Money from the hands of *Sansom & Co.*; that the 2,000 *l.* was not paid in to *Fisher's* general Account, but that, by *Fisher's* Letter of the 22d of January 1831, the 2,000 *l.* was distinguished from his other Monies, at the time of payment, and that *Sansom & Co.* had notice, from *Fisher*, of the 2,000 *l.* being subject to a Trust; and that there was a privity, between the Plaintiffs and the Bankers, so far, at least, as to exonerate the Defendant; that, by reason of the Notice given to *Francis Macdonnell* and the acquiescence consequent thereon, the 2,100 *l.* must be considered to have been the Money either of *Francis Macdonnell* alone, or of him and the other Plaintiffs, or, at all events, to have been placed in the hands of *Sansom & Co.* with their privity and acquiescence; and, consequently, that the Loss must be borne by them.

Fisher, in his Answer, said that *Sansom & Co.* were not his general Bankers, but were occasionally employed by him for effecting payments to his Clients and others who resided at a distance; and that he remitted the Bank Post Bills, to *Sansom & Co.*, for the purpose of

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Francis Macdonnell, who was then in *London*, receiving the amount immediately, and with his privity, and that it was competent, to *F. Macdonnell*, to have procured the necessary Release to be executed and to have received the Trust Monies within a few days after the Remittance. He denied that the 2,000 *l.* was paid to the Bankers as his money, on account of the Notice given to them that it would be wanted to pay over to *F. Macdonnell* in a few days; and he submitted that the 2,000 *l.* was specifically appropriated to answer the Plaintiff's demand and that he was not liable to the Plaintiff, and that, as the Solicitor of Mrs. *Harding*, he was improperly made a Party to the Suit: that the lodgment of the Money with *Sansom & Co.*, until the Release was executed, was justified by the necessity of the case, and by the prospect of an immediate payment to *F. Macdonnell*, who was then in *London*: and that immediate Notice was given, to him, of such lodgment, to which he ought to have objected in the first instance, if at all, and not after the Insolvency of the Bankers: that neither of the Defendants derived any benefit from the Money whilst it was so lodged; and the same care was taken, by Mrs. *Harding* and by himself as her Solicitor, of the Trust Fund as if it had belonged to her: and that *F. Macdonnell* had been guilty of gross laches in not sooner procuring the Release to be executed and getting out the Money, of the lodgment and appropriation of which he had received express Notice.

Subsequent to the institution of the Suit, *F. Macdonnell*, by arrangement between the Parties and without prejudice to any question in the Cause, received, from the Assignees of *Sansom & Co.*, the sum of 1,280 *l.*, being the amount of a Dividend of 12 *s.* in the Pound,

upon 2,100*L.*, which *Fisher* had proved under their Bankruptcy.

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Sir *E. Sugden*, Mr. *Knight* and Mr. *Campbell*, for the Plaintiffs :

Mrs. *Harding* was not justified in making *Fisher* her Depositary of the Money, and allowing him to deal with it as his own. She ought either to have directed the Mortgagee to pay the Money to the Plaintiffs, or to have taken the Bank Post Bills and secured them in her own chest, or to have appropriated them at a Banker's: in which case, the Banker, if he had misapplied them, would have been guilty of a transportable offence.

Fisher did not so deal with the Fund as to exonerate himself from responsibility. He had the same means of protecting it as Mrs. *Harding* had. But he sent the Bank Post Bills to his Bankers, and allowed them to carry the amount to his general Account. The Money ought to have been paid into a Banker's, in the joint names of Mrs. *Harding* and the Plaintiffs. The defence is that the Plaintiffs knew that the Money was in the hands of *Sansom & Co.* *Fisher*, however, in his Letter of the 22d of January 1831, did not tell the Plaintiffs what he had done with the Money: and, though, in his Letter of the 3d of February, he informed them that it was at *Sansom's*, he did not tell them that it was not appropriated, but was mixed with his own Monies, nor did he tell them that it had been remitted in Bank Post Bills. Mrs. *Harding* had no right to demand a formal Release before the Money was paid; and, therefore, the Money was improperly detained from the Plaintiffs. *Massey v. Banner* (a), *Wren v. Kirton* (b).

(a) 1 Jac. & Walk. 241.

(b) 11 Ves. 377.

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Sir *Chas. Wetherell* and Mr. *B. Anderdon* for the
Defendant Mrs. *Harding* :

Mrs. *Harding* was not compellable, by the terms of the Settlement, to shift the Trust-monies, from an Investment in the Funds, to a Mortgage: but she did so at the instance and for the profit of the *Cestuis que* Trust, who were anxious to take advantage of the high price of the Funds. After the Trust Stock had been sold out, *Francis Macdonnell* dealt with the Money as his own. He corresponded with *Fisher* and gave him directions as to the mode in which the Money was to be dealt with. He superseded Mrs. *Harding* and adopted *Fisher* as his Trustee or Agent. He did not object to the 576*l.* 15*s.* 10*d.* remaining in *Fisher's* hands, or to the 1,500*l.* being remitted to *Sansom & Co.* That remittance was made in order to facilitate the payment to *Francis Macdonnell*, who was then in *London*; and, on the 3d of February (which was more than a month before the Failure of *Sansom & Co.*) *Fisher* informed him that the Money was lying idle in their hands. They, therefore, were his Depositaries of the Money until the Release was executed, as much as if he had named them; and it was owing to his delay that the Money remained in their hands at the time of their Failure. Under these circumstances, it is impossible to contend that Mrs. *Harding* is responsible for the Loss.

Mr. *Wigram*, for the Defendant *Fisher* :

Mrs. *Harding* is primarily liable to make good the Loss. There was no privity between *Fisher* and the Plaintiffs. He was merely the Middle-man, representing Mrs. *Harding*; and the whole of the Correspondence shows that *Francis Macdonnell* dealt with him, merely as the Solicitor or Agent of Mrs. *Harding*, and that he considered her alone to be liable for the Loss.

Francis Macdonnell, who was, himself, a Solicitor, never took the point that has been raised by Sir *E. Sugden*, namely, that Mrs. *Harding* was not entitled to insist on being released before the Money was paid over to the Plaintiffs; but he acquiesced in the Release as a thing to be done.

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Fisher informed him that the Money was lying idle at *Sansom's*; and, as he made no objection, we have a right to say that he acquiesced in the Money being in their hands: it was placed there for the convenience of *Francis Macdonnell*; and its remaining there at the time when the Bank failed, was owing to the delay which took place in consequence of *F. Macdonnell* sending the Release to different parts of the Country, to be executed.

The VICE-CHANCELLOR:

In this Case, the Defendant, *Elizabeth Harding*, as the Executrix of the Survivor of two Trustees under a Settlement dated the 8th of December 1786, was a Trustee of certain Sums of Three-and-a-half per Cent. Reduced Annuities and New Four per Cents., for Mrs. *Macdonnell* for her life, and, after her death, for the Plaintiffs. The Plaintiff, *Francis Macdonnell*, resided at that time at *Usk* in *Monmouthshire*, and the Plaintiff, *Thomas Macdonnell*, at *Birmingham*, the Plaintiff, *Eliza Macdonnell*, at *Spitsbury* near *Blandford*, and *Elizabeth Harding*, the Defendant, resided at *Shrewsbury*, and the other Defendant, *Fisher*, who was her Solicitor, resided at *Newport* in *Shropshire*. On the 9th of March 1827, the Plaintiff, *Francis Macdonnell*, sent a Letter, from *Usk*, to Mr. *Fisher* at *Newport*, which was to this effect: see p. 179.

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It does not appear that the Share of the Plaintiff, *Eliza Macdonnell*, was assigned to her Brother, *Francis Macdonnell*: but whatever, in the course of the transaction, would bind the Plaintiff, *Francis*, so as to prevent him from obtaining Relief in this Cause, would equally bind the Co-plaintiffs.

This Letter of the 9th of March, was the commencement of a long Correspondence between the Parties, from which it appears that, in January 1830, the Trust Stock was sold and produced two Sums, making, together, 2,076*l.* 15*s.* 10*d.*, of which 1,500*l.* was invested on a Mortgage in the name of Mrs. *Harding*, and the remainder, being a sum of 576*l.* 15*s.* 10*d.*, lay in the hands of Mr. *Fisher*.

On the 23d of February 1830, *Fisher* wrote, to *Francis Macdonnell*, the following Letter: see p. 180.

That Letter distinctly informed the Plaintiff, *Francis Macdonnell*, that the 576*l.* 15*s.* 10*d.* was in the hands of *Fisher*, who offered to keep it, allowing him interest for it: and, as *Francis Macdonnell* never objected to its continuing in *Fisher's* hands, *Fisher* alone must be considered as responsible, to the Plaintiff, for that Sum.

On the 14th of September 1830, the Tenant for Life died; and information of that event was, shortly afterwards, sent to the Defendant, by *Francis Macdonnell*, who required a transfer of the Trust Fund. On the 1st of November 1830, *Fisher* wrote, to *Francis Macdonnell*, a Letter, in which, after alluding to the Mortgage for 1,500*l.*, he said: "There is a second Mortgagee, who is willing now to advance the 1,500*l.*, if you wish to

have the Money in preference to a transfer of the Security:" and, in Answer, *Francis Macdonnell* wrote, to *Fisher*, a Letter of the 6th of November 1830, in which he said: "I have, long since, purchased the interest of my Sister's Share, and have arranged, lately, with my Brother, to give him Ten per Cent., for his life, upon his Share. I shall be obliged to you to expedite the Transfer as much, and let it be with as little expense as you can. I have an opportunity of investing 3,000 *l.* at Seven-and-a-half per Cent., which I should not like to lose; and, therefore, I would rather take the 1,500 *l.* in Cash."

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On the 16th of December 1830, *Fisher* wrote, to *Francis Macdonnell*, a Letter, in which he said: "I have delayed writing to you from not being able to obtain a final Answer, of my Client, as to the time when he would advance 1,500 *l.* on the Security placed out in *Mrs. Harding's* name with part of your Trust Fund. He has now fixed to do so about the 16th of January; in the meantime, in a few days, that matter being arranged, I will send you the Draft of the proposed Release of the Trust."

On the 21st of January 1831, the Mortgage for 1,500 *l.* was transferred to Mr. *Nanney*, who paid the 1,500 *l.*, to *Fisher*, by giving him two Bank Post Bills for 1,000 *l.* each, and received back, from him, 500 *l.*; On the same day, *Fisher* transmitted to *Francis Macdonnell*, who was then, and for some time before had been, and, for some time after, remained at *Will's* Coffee-house in *London*, for some temporary purpose, an Account Current and a Bill of Costs headed: "*Mrs. Elizabeth Harding to Robert Fisher Dr., In re Macdonnell,*" and a Draft

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Release. In the Bill of Costs, a Charge was made for delivering over the Security, and receiving the 1,500*l.*

On the 21st of January 1831, *Fisher* transmitted from *Belmont* near *Llanrcst*, which was the residence of his Client, Mr. *Nanney*, the two Bank Post Bills, to Messrs. *Sansom & Co.* in the following Letter: "enclose you two Bank Post Bills for 1,000*l.* each, to be placed to my credit; and I shall be obliged to you to acknowledge the receipt by the return of post to me as under. This money will be wanted by me to pay over to a Mr. *Macdonnell*, in a few days probably." The amount of the Bills was placed, by *Sansom & Co.*, to the credit of *Fisher's* general Account with them.

On the 3d of February, *Fisher* sent the following Letter to Mr. *Macdonnell*, who was then in *London*: see p. 182. And that Letter seems to have been answered, by Mr. *Macdonnell*, from *Usk*, on the 15th: see p. 182. And on the 19th of February, *Fisher* wrote, to *Macdonnell*, a Letter containing the following passage: "On hearing from you that the Assignment is completely executed and returned to Mr. *White*, I will write, to my Agents, with an order on *Sansom & Co.*, directing them to pay, to the Cheque of any person whom you may require, the sum of 2,100*l.* in exchange for the Release." Mr. *White* was Mr. *Macdonnell's* *London* Agent. On the 7th of March, Mr. *Macdonnell* sent the following Letter to Mr. *Fisher*: see p. 183. On the same 7th of March, Messrs. *Sansom & Co.* stopped payment. On the 8th of March, the Release, which had been executed by all the Plaintiffs, was sent, by *F. Macdonnell*, to Mr. *White*. On the 10th of March, he tendered it to *Fisher's* *London* Agents; but Mrs.

Harding refused to pay the 2,100 *l.* mentioned in the Release. The subsequent Correspondence does not affect the Case. A Commission issued against *Sansom & Co.* on the 7th of May 1831. At the time of their stoppage, the Balance due on *Fisher's* Account current with them, was 2,145 *l.* *Fisher* made an Affidavit of Debt of 2,100 *l.*, part of that Balance; and, on the 18th of January 1832, *F. Macdonnell* received, from the Assignees, a Composition of 1,260 *l.*, by arrangement with the Defendants, and with their consent, and without prejudice to any question between the Parties to this Suit. The question before me, is upon whom must the Loss fall.

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If the payment of the 2,000 *l.* into *Sansom & Company's*, in the manner in which it was paid, had been necessary for the final winding-up of the Trust, or if, with full Notice of the manner in which it was paid, *Macdonnell* had acquiesced, the Loss must, upon the principles laid down in *Wren v. Kirton* and *Massey v. Banner*, have been borne by the Plaintiff. The Correspondence shews that *F. Macdonnell* admitted that Mrs. *Harding* had a right to a Release: yet there is nothing to shew that, in order to procure an exchange of the Release for the Money, it was necessary to send the Money to a *London* Banker's: certainly, it was not necessary that it should be placed, at the Banker's, to the credit of the general Account which *Fisher* kept with them. And, if *Fisher* thought proper so to place it, he ought, in order to throw the responsibility on *Francis Macdonnell*, to have given distinct Notice that the Money was so placed. But neither the Letter of the 3d of February 1831, nor the Letter of the 19th of the same month, conveyed any such Notice. The Loss, therefore, must be borne by the Defendants. But, as I

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have already stated, in consequence of the Letter of the 23d of February 1830 and of Mr. Macdonnell acting upon it, Mrs. Harding will not be liable for the excess beyond 1,500 *l.*: and, as 1,260 *l.* has been already paid to Mr. Macdonnell, Mrs. Harding is, in my Judgment, liable to pay 240 *l.* only (which, with 1,260 *l.* makes up the 1,500 *l.*) with such Interest as may be due: and Fisher, who, throughout acted as her Solicitor, is liable to pay the 240 *l.*, and also the additional sum of 600 *l.** with Interest: and the Defendant must pay, the Plaintiffs' Costs of the Suit.

* *Qu.* Whether Fisher ought to have been made exclusively liable for more than the 576 *l.* 15 *s.* 10 *d.* with Interest

1834 :
 26th November.

MURRAY v. BARLEE.

Feme Coverte.
Solicitor and
Client.
Costs of
Taxation.

A married
 Woman having
 separate Property, employed
 a Solicitor, and
 undertook to

pay him out of her separate Estate. By the Decree in a Suit instituted by the Solicitor, his Bills were ordered to be paid out of the separate Property, and it was referred to the Master to tax them. *Semble* that the Solicitor is entitled to the Costs of Taxation, though more than one sixth was taken off.

THE Plaintiffs were Attornies and Solicitors, and have been employed, in those characters, by the Defendant who was a married Woman, having Property settled to her separate Use. The object of the Suit was to obtain payment of the Bills of Costs, due from the Defendant to the Plaintiffs, out of the Defendant's separate Property *. The Decree referred it to the Master to Tax the Bills, and ordered the Amount due to the Plaintiffs

* See *Ante*, Vol. 4, pages 82. 95.

to be paid out of the Defendant's separate Property. The Bills were, accordingly, taxed, and more than one sixth was taken off.

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The Plaintiffs now moved for a Reference, to the *Master*, to tax the Plaintiffs their Costs of taxing the Bills mentioned in the Decree, and that those Costs, when taxed, might be paid out of the Defendant's separate Estate.

Sir *E. Sugden*, for the Plaintiffs, said that it was the settled practice at Law, that, if a Client suffers an Action to be brought against him, before he obtains an Order for taxing his Attorney's Bill, he is not entitled to be paid the Costs of Taxation, although more than one sixth may have been struck off. *Benton v. Bullard* (a), *Jay v. Coaks* (b), *Harbin v. Miles* (c).

Mr. *Girdlestone*, jun., for the Defendant, said that the Bills had been delivered under the Statute (2 Geo. 2, chap. 23); that the Suit was rendered necessary in consequence of Mrs. *Barlee* being under Coverture; that, otherwise, the Plaintiffs would have sought Payment of their Bills under the Statute; that the Decree gave the Plaintiffs the Costs of the Suit, but not the Costs of Taxation; and, as more than one sixth of the Bills had been disallowed, the Defendants ought to pay the Costs of Taxation.

The VICE-CHANCELLOR:

The Suit was instituted in order to enforce payment of the Plaintiffs' Bills, out of the Defendant's separate Pro-

(a) 4 Bing. 561.

(b) 8 Barn. & Cress. 635.

(c) 9 Barn. & Cress. 755, and 1 Smith's Prac. Chan. 545.

See also *Spelman v. Woodbine*, 1 Cox, 49.

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perty, which she had made liable to the Plaintiffs' demands. The case is the same as if the Defendant, being sole, had refused to pay the Bills ; and, I am inclined to think that the Rule at Law ought to be adopted in this Court. But, as the question is of some importance, I should like to have an opportunity of considering before I decide it.

Sir E. Sugden :

I will take the Order, subject to Mr. *Girdlestone* being able to displace it.*

* The Parties having come to an arrangement, the Motion was not again mentioned.

MEMORANDUM.

On the 21st of November 1834, Lord *Brougham* and *Vaux* resigned the Great Seal ; which was delivered by His Majesty, to Lord *Lyndhurst*, C. B. of the Exchequer.

Shortly afterwards, Sir *John Campbell*, Knight, His Majesty's Attorney-General, and *R. M. Rolfe*, Esq. His Majesty's Solicitor-General, resigned their respective Offices, and were succeeded by *Frederick Pollock*, Esq. and *William Webb Follett*, Esq., who, thereupon, received the Honour of Knighthood.

CLARKE v. GOULD.

1834 :
10th Dec.

*Will.
Construction.*

THOMAS PALMER being possessed of Leasehold Property and other Personal Estate, by his Will dated the 30th of December 1811, bequeathed all his Personal Estate and Effects unto his Wife, *Sarah Palmer*, for her natural Life, for her own use and benefit, and, from and after her decease, he bequeathed the same unto the Defendant, *Gould*, upon Trust to pay and apply *the Rents and Profits* of all his said Personal Estate and Effects, *for and towards the Support and Maintenance* of his, the Testator's, five Nephews and Nieces, Children of his Brother *Joseph Palmer*, namely, *Thomas Palmer* the younger, *Sarah Palmer*, *Elizabeth Palmer*, *Joseph Palmer* and *Jane Palmer*, and of his Niece *Elizabeth Cockrell*, Daughter of his Sister *Mary*, Wife of *William Cockrell*, in equal Shares and Proportions, share and share alike; and, *in case of the death* of any or either of his Nephews and Nieces, in Trust that *Gould*, his Executors or Administrators, should pay and divide *the Rents and Profits* of his Personal Estate and Effects, equally between the Survivors of them, *for their respective Support and Maintenance*.

The Testator left his Wife and all the Legatees named in his Will, him surviving.

The Testator's Niece, *Jane Palmer*, intermarried with the Plaintiff; and she and all the other Legatees survived the Testator's Widow. *Jane Clarke* died in December 1831, and her Husband took out Administration to her.

Testator bequeathed his Personal Estate to his Wife, for life, and, after her death, to a Trustee, in Trust to pay *the Rents and Profits* of his Personal Estate, for and towards the Support and Maintenance of his six Nephews and Nieces, and *in case of the death* of any of them, for the Maintenance and Support of the Survivors. All the Nephews and Nieces survived both the Testator and his Widow. One of the Nieces then died. Held that her Share did not become undisposed of, but that she, by surviving the Testator's Widow, had become absolutely entitled to it.

1854.

CLARK

v.

GUTH.

The Bill alleged that the Plaintiff's late Wife, having survived the Testator's Widow, did, according to the true construction of the Will, become entitled, also jointly, to One-sixth Share of the Testator's Personal Estate, and that the Plaintiff was then entitled thereto but that the Defendants *Joseph Palmer*, the elder, and *William Cudrell* and *Mary* his Wife, as the Next of Kin of the Testator, and the Defendants *Thomas Gould* and *Richard Cargor* and *Sarah* his Wife, in her right as the Representatives of the Testator's Widow, insisted that the Testator had died intestate as to the Share so bequeathed to the Plaintiff's late Wife, subject only to the Life Interest which she took therein under the Will and that, therefore, the Defendants, as such Next of Kin of the Testator and Representatives of his Widow, were entitled to such Share as undisposed of by the Will and that the other Defendants, the Legatees, insisted that they were, under the Will, entitled to such Share by survivorship.

The Bill prayed that the Plaintiff might be declared entitled to One-sixth part of the Testator's Leasehold Property and other Personal Estate.

Sir *E. Sugden* and Mr. *Rogers*, for the Plaintiff:

A Gift of the Rents and Profits of an Estate, will pass the Estate itself. Where there is a Gift over after a Tenancy for Life, and the death of the Legatee over is spoken of hypothetically, the meaning is, in case the Legatee dies before he becomes entitled in possession. The conclusion of the Will is conclusive; for there is no Gift over: and, therefore, Life-Estates only were not intended to be given to the Legatees. The Testator has given the whole legal Interest to the Trustee; and

therefore, he meant to dispose of the whole beneficial Interest. *Adamson v. Armitage* (a).

1834.

CLARKE

v.

GOULD.

Mr. G. Richards, for the Legatees.

Mr. Bichner, for the other Defendants :

In those cases in which it has been held that a Gift of the Income of Property, will pass the Capital, the Income has not been given *for the Support and Maintenance* of the Legatee : and, where the words : “ in case of the death,” have been held to mean in case of the death of the Legatee over in the lifetime of the Tenant for Life, the Capital of the Property has been given to the Legatee over.

The VICE-CHANCELLOR :

The words, “ in case of the death,” must refer to the death of the Niece in the lifetime of the Tenant for Life. The Niece survived both the Testator and the Tenant for Life ; and, of course, the Share became, absolutely, hers. It is clearly an absolute Gift.

(a) 19 Ves. 416. S. C. Coop. C. C. 283.

HAWKINS v. WATTS.

THE Plaintiff had married the Daughter of the Testator in the Cause ; and the Daughter had died leaving two infant Children. The Testator gave Two Fifth parts of his Personal Estate to the Plaintiff, in trust to apply the same for the Maintenance and Use of the Plaintiff's Children by the Testator's late Daughter.

1834 :

11th December.

*Parent and
Child.
Maintenance.*

Testator gave a Share of his Personal Estate to his Son-in-

law, in Trust, to apply the same for the Maintenance and Use of his Children by the Testator's Daughter. Held that the Son in-law was entitled to apply the Interest of the Share, for his Childrens' Maintenance, notwithstanding he might be of ability to maintain them.

1834.

HAWKINS

v.

WATTS.



The *Vice-Chancellor* held that the Plaintiff was entitled to apply the Interest of the Two Fifths, for the Maintenance of his Children by his late Wife, notwithstanding he might be of ability to maintain them.

Sir *E. Sugden* and Mr. *James Russell* for the Plaintiff.

Mr. *Knight*, Mr. *Simons* and Mr. *Daniell* for the Defendants.

1834 :
12th December.

RICKETTS v. MORNINGTON.

Defendant.
Contempt.

A Defendant cannot object to a Cause being heard, on the ground that the Plaintiff is in Contempt.

ON this Cause being called on, Mr. *Knight*, for the Defendant, objected to its being heard, as the Plaintiff was in Contempt, an Attachment having issued against him for Disobedience to an Order in the Cause. He referred to the 78th of Lord Bacon's Orders (a), and to *Vowles v. Young* (b).

THE VICE-CHANCELLOR:

Suppose the Defendant had moved to dismiss the Bill, the Plaintiff, notwithstanding he was in Contempt, might have come forward and assigned reasons why his Bill should not be dismissed.

Lord Bacon's Order, as administered in Practice, is confined to Cases where Parties who are in Contempt come forward, voluntarily, and ask for Indulgences. But the Rules of the Court make it imperative on the Plaintiff to bring his Cause to a Hearing at a certain time ; and, therefore, the Cause must proceed.

(a) Beam. Ord. 35.

(b) 9 Ves. 172.

CROSS v. CROSS.

1834 :
15th December.*Will.*
Construction.

THE Testatrix in this Cause gave the Residue of her Personal Estate, to *William Holt Davison* and *William Painter*, upon Trust to invest the same on good Security; and then continued as follows: "And I do hereby will, order and direct the said *William Holt Davison* and *William Painter*, to pay and divide the Interest, Income, Dividends and Produce arising from my said Personal Estate, between my Nieces, *Charlotte Elizabeth Cheatell*, Spinster, and *Margery Allen Murrey Cross*, the Wife of *John Cross*, and their Assigns, in equal parts, shares and proportions, during the term of their natural lives, and, from and after the decease of my said Nieces, *Charlotte Elizabeth Cheatell* and *Margery Allen Murrey Cross*, upon Trust to pay and divide all and singular the said Trust-monies and Premises, unto and amongst the lawful Issue of the said *Charlotte Elizabeth Cheatell* and *Margery Allen Murrey Cross*, or of such of them as shall leave Issue, in equal parts, shares and proportions, per stirpes and not per capita; and, in default of such Issue, upon further Trust to pay the Interest, Income, Dividends and Produce arising from my said Trust-monies and Premises, unto *William Wright*, *Robert Wright* and *W. Walton Wright*, and their Assigns, during the term of their natural lives, in equal parts, shares and proportions; and, from and after the decease of the said *William Wright*, *Robert Wright* and *W. Walton Wright*, upon Trust to pay and divide, all and singular the said Trust-monies and Premises, unto and amongst the lawful Issue of the said *William Wright*,

Testatrix bequeathed her Residuary Estate to Trustees, in Trust to pay and divide the Interest between her two Nieces, equally, during their lives, and, after their deaths, to pay and divide the Principal, unto and amongst the lawful Issue of her said Nieces, or of such of them as should leave Issue, equally, per stirpes and not per capita; and, in default of such Issue, to pay the Interest to certain other Persons, for their lives, &c. One of the Nieces died, having had seven Children, five only of whom survived her. Held, that those five be-

came entitled, on their Mother's death, to her Moiety of the Residue.

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Robert Wright and *W. Walton Wright*, or such of them as shall leave Issue, in equal parts, shares and proportions, *per stirpes* and not *per capita*; and, in default of such Issue, then upon further Trust to pay and divide all and singular the said Trust-monies, unto such Person or Persons as shall become entitled to and possessed of my Real Estate under the Limitations of this my Will, in equal parts, shares and proportions, if more than one, and, if but one, then to such one Person only."

The Testatrix died in 1818. After her death, *Charlotte Elizabeth Cheatell* married *George Houghton*, and had Issue by him two Children, both of whom were Infants and unmarried. Mrs. Cross died in 1834, having had issue seven Children, five of whom survived her; the other two died Infants and unmarried; and, after her death, one of the five died unmarried.

The Bill was filed by three of Mrs. Cross's surviving Children, against the fourth Child (all of whom were Infants and unmarried), and against the Representatives of the three deceased Children, and the other Parties interested in the Residue, praying that the Trusts of the Will might be performed and the Rights of all Parties declared.

Mr. Rolfe and Mr. Bacon, for the Plaintiffs, contended that such only of the Children of Mrs. Cross as were living at her decease, became entitled to the Moiety of the Residue given to her for life.

Sir E. Sugden and Mr. Simons, for the fourth surviving Child and the Representative of the Child who died after Mrs. Cross.

Mr. *Knight* and Mr. *O. Anderdon*, for Mr. and Mrs. *Houghton* and their Children, said that it would be premature for the Court to make any declaration as to Mrs. *Houghton's* moiety.

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Mr. *Preston* and Mr. *Daniell* for the Representative of the two Children of Mrs. *Cross* who died in their Mother's lifetime, contended that *all* the Children took vested Interests in their Mother's Moiety, subject to be divested on their Mother dying without leaving Issue at her death, which event had not happened. *Bayard v. Smith (a)*, *Stanley v. Wise (b)*.

Sir *C. Wetherell*, Mr. *Beames* and Mr. *Jemmett*, for the *Wright* Family, said that the Interests of the Children of both the Testatrix's Nieces, would remain in contingency until the death of the surviving Niece, and that such only of their Children as should be then living, would become entitled to the Residue; and, if there should be no Child of one of them then living, the whole would go to the Children of the other; and, if no Child of either of them should be then living, it would go over to the *Wrights*.

The *Vice-Chancellor* having said, in the course of the Argument, that he ought not to pronounce any Decision as to Mrs. *Houghton's* Moiety, delivered Judgment as follows:

The question is what class of Issue is meant by the expression: "The lawful Issue of the said *Charlotte Elizabeth Cheatell* and *Margery Allen Murrey Cross*." If you read on a little further, you will find that the construction is afforded by the subsequent words: "or of such of them as shall leave Issue." The word

(a) 14 Ves. 470.

(b) 1 Cox, 432.

1834.

CROSS

v.

CROSS.

'Issue,' therefore, in the first part of the sentence means those who are left by the Parent of the Issue. And, consequently, the five Children of Mrs. Cross who survived her, are entitled to her Moiety of the Residue.

Declare that the five Children of Mrs. Cross who were living at their Mother's decease, are entitled to her Moiety of the Residue, in equal Shares; and that Mrs. Houghton is entitled to the other Moiety for her life; and, on her death, any of the Parties are to be at liberty to apply.

1834:
17th December.

AITON v. BROOKS.

Will.

Construction.

Testator bequeathed a Sum of Stock to A. and B., for their lives, and, on their deaths, to their Children then living who should attain 21, with a Gift over to the Survivor of A. and B. in case the Children of either of them should die under 21. A. died leaving a Child who had attained 21. B. afterwards died without having had a Child. Held that A.'s Personal Representatives were entitled to B.'s Moiety of the Stock.

CHARLES COX having power to dispose, by Will of 1,500 *l.* Three per Cents., which was standing in the names of *John Blakeney* and *James Findlay*, and which in default of appointment, was limited to his Next of Kin, exercised the power in the following words: "Now I the said *Charles Cox*, by virtue of the power &c., do give, bequeath, direct, limit and appoint the Interest Dividends and Produce of the said Sum of 1,500 *l.* Stock, unto and amongst *Eleanor Beazley*, the Wife of *John Beazley*, and *Mary Houshold*, Wife of *Abraham Houshold*, Daughters of my late Sister, *Elizabeth Loder*, for and during the terms of their natural lives, in equal Shares and Proportions, and, immediately upon the death of either of them, then I direct my said Trustees and the Survivor of them, his Executors or Administrators, to pay, apply and dispose of the Share of such deceasing Legatee (being a Moiety) of and in the said principal Sum of 1,500 *l.* Stock, unto and amongst all

and every the Children of such deceasing Legatee, born in lawful matrimony (if any) which shall be living at the time of the decease of their Mother, who shall then have attained or thereafter shall live to attain the age of 21 years, share and share alike, and the Interest, Dividends and Produce of each respective Share of such of the said Children as shall not then have attained the age of 21 years, in the meantime, to be paid and applied for or towards their respective maintenance, education and bringing-up; but in case any of such Children shall happen to die before they shall attain the age of 21 years, then I give and bequeath, the Part, Share and Proportion of such deceasing Child, unto the Survivors of them, if more than one, share and share alike, and, if but one such Child, then to such only one, and to be paid and applied in like manner as is hereinbefore mentioned. Provided always that, in case either of them, the said *Eleanor Beazley* and *Mary Houshold*, shall have any Child or Children living at the time of their respective deceases, but which shall all die before they attain the age of 21 years, then my said Trustees, *John Blakeney* and *James Findlay*, their Executors or Administrators, shall assign the Part or Share of such Legatee so dying (without Issue to enjoy as aforesaid) of and in the said 1,500 l. Stock, unto the Survivor of them the said *Eleanor Beazley* and *Mary Houshold*, her Executors or Administrators."

Mrs. *Beazley* and Mrs. *Houshold* survived the Testator. In 1827 Mrs. *Beazley* died leaving *Elizabeth*, the Wife of *Harry Jackson*, who had attained 21, her only Child. In 1829 Mrs. *Houshold* died, without having had any Issue.

The Plaintiffs were the Representatives of the surviving Trustee of the Stock, and also of the Testator.

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The Bill was filed to have the Trusts of the Will carried into execution, and the rights of the Parties claiming the Moiety of the Stock limited to Mrs. *Houshold* for life, declared. The question was whether in the event, which happened, of Mrs. *Houshold* dying without having a Child living at her death, that Moiety of the Stock was disposed of by the Will; or whether the Testator's Next of Kin were not entitled to it by virtue of the limitation contained in the Settlement, in default of appointment.

Mr. *Wilbraham* appeared for the Plaintiffs.

Mr. *Knight*, for the Defendants, the Personal Representatives of Mrs. *Beazley*, cited *Gulliver v. Wickett* (a); *Murray v. Jones* (b), and *Mackinnon v. Sewell* (c).

Mr. *Beames*, Mr. *Bacon* and Mr. *O. Anderdon*, for the other Defendants.

THE VICE-CHANCELLOR:

The question is whether the Testator, by the word he has used, has exercised the power over the Moiety of the Stock given to Mrs. *Houshold* and her Children, so as to make a complete disposition of it.

The Testator seems to have taken it for granted that both Mrs. *Beazley* and Mrs. *Houshold* would have Children, and that the only doubt was whether their Children would live to attain 21. After giving the Stock to those Ladies for their lives, he says: "And immediately upon the death of either of them, then

(a) 1 Wils. 105.

(b) 2 V. & B. 313.

(c) *Ante* vol. 5, p. 78, and 2 Myl. & Keen, 202.

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I direct my said Trustees and the Survivor of them, his Executors or Administrators, to pay, apply and dispose of the Share of such deceasing Legatee (being a Moiety) of and in the said principal Sum of 1,500 *l.* Stock, unto and amongst all and every the Children of such deceasing Legatee born in lawful Matrimony (if any) which shall be living at the time of the decease of their Mother, who shall then have attained, or thereafter shall live to attain the age of 21 years, share and share alike, and the Interest, Dividends, and Produce of each respective Share of such of the said Children as shall not then have attained the age of 21 years, in the meantime, to be paid and applied for or towards their respective maintenance, education and bringing up: but, in case any of such Children shall happen to die before they shall attain the age of 21 years, then I give and bequeath, the Part, Share and Proportion of such deceasing Child, unto the survivors of them, if more than one, share and share alike, and, if but one such Child, then to such only one, and to be paid and applied in like manner as is hereinbefore mentioned." There is, therefore, no Gift to a Child, except in the event of there being a Child living at the death of the Mother and attaining 21. The Testator then says: "Provided always that, in case either of them, the said *Eleanor Beazley* and *Mary Household* shall have any Child or Children living at the time of their respective deceases, but which shall all die before they attain the age of 21 years, then my said Trustees, *J. Blakeney* and *J. Finlay*, their Executors or Administrators, shall assign the Part or Share of such Legatee, so dying without Issue to enjoy as aforesaid, of and in the Sum of 1,500 *l.* Stock, unto the Survivor of them, the said *Eleanor Beazley* and *Mary Household*, their Executors or Administrators."

I cannot but think that the Testator intended the Limi-

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tation over to take effect in the event of either of the Ladies not having a Child to take, as well as in the event of either of them not having a Child who should take so as to enjoy, although she has expressed the Limitation over should take effect in the latter case only.

My Opinion, therefore, is that, according to *Mackin v. Sewell*, the Limitation over has taken effect.

I am also of opinion that the word 'Survivor,' in the event of necessity, be taken to mean 'other.' For the Testator contemplated the event, not of one of the Legatees dying in the lifetime of the other, but of one of them dying childless. The consequence is that the Parties representing Mrs. *Beazley*, are entitled to Mrs. *Houshu* Moiety of the Stock.

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11th Dec.

PILCHER v. HOLE.

*Will.**Construction.*

Testator directed his Trustees to invest such a Sum as would produce 40 *l.* a year, and to pay the same to his Daughter, and, after her death, to transfer the Fund to his Residuary Legatees: and he gave 100 *l.* to his Daughter absolutely. By a Codicil he revoked the Sum of 1,200 *l.* given to his Daughter for her life, and gave her 500 *l.* in lieu thereof. Held that, as the 40 *l.* a year was the only Sum given to the Daughter for her life, it was revoked by the Codicil.

THOMAS HOLE, the Father of the Plaintiff, *Pilcher*, by his Will, dated the 4th of May 1823, gave to Trustees 1,000 *l.* Three per Cent. Consols, in Trust to pay the Interest and Dividends thereof to Mrs. *Pilcher*, for her life, for her separate Use, and, after death, in Trust to assign and transfer the same to such of her Children as she should by Deed or Will appoint.

and, in default of appointment, to all her Children equally.

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The Testator, by a Codicil dated the 10th of November 1828, revoked the Bequest of the 1,000 *l.* Consols, and directed his Trustees to invest such a Sum on Government or Freehold Security as would produce, annually, 40 *l.*, and pay the same, by half-yearly Payments, to Mrs. *Pilcher*, for her separate Use, and, after her death, to transfer the said Sum, or the Security or Fund on which the same should be invested, unto his Residuary Legatees. The Testator also gave, to Mrs. *Pilcher*, the Sum of 100 *l.*, to be paid into her proper hands, and not into those of her Husband.

The Testator made another Codicil, dated the 10th of September 1830, which was partly as follows : " I hereby revoke the Sum of 1,200 *l.*, given to my Daughter, Mrs. *Pilcher*, for her life, and, in lieu thereof, give her the Sum of 500 *l.* absolute, for her own separate Use, without any interference of her Husband, to be paid her within six months after my decease."

The Testator died on the 10th of October 1831.

The Bill was filed by Mrs. *Pilcher*, by her next Friend, against the Executors of the Will and her Husband, praying that a sufficient Sum might be invested for securing the Payment of the annual Sum of 40 *l.* The question was whether the Bequest of that Sum was revoked by the second Codicil.

Sir *E. Sugden* and Mr. *Wilcock*, for the Plaintiff :

There is not a sufficient indication of Intention in this Case, to enable the Court to act. A Legatee ought not

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to be deprived of a Legacy, on mere conjecture. By the second Codicil, the Testator revokes the Sum of 1,200*l.* given to his Daughter. No Sum of that amount appears to have been previously given; and, therefore, it may be fairly supposed that that Sum was given by a Codicil made in the interval between the dates of the two Codicils, but which the Testator afterwards destroyed.—[The *Vice-Chancellor*: I am not at liberty to act upon such a supposition.]—There is no more reason for holding the 500 *l.* to be in lieu of the 40 *l.* a year, than there is for holding it to be in lieu of the 100 *l.*

Mr. *Knight* and Mr. *Piggott*, for the Executors:

A mistaken reference to a Legacy, is not important, provided the Intention can be collected. There was no Gift of 40 *l.* a year, but there was a direction to invest such a Sum as would produce 40 *l.* a year; and, at the then price of Consols, 1,200 *l.* would have produced, exactly, 40 *l.* a year. The 1,200 *l.*, therefore, is capable of being identified with the 40 *l.* a year.—[The *Vice-Chancellor*: I cannot look at the Price of Stocks, for the purpose of putting a Construction on these Instruments.]—The words: “for her life,” exclude the supposition that the 500 *l.* was intended to be in lieu of the 100 *l.* *Philipps v. Chamberlaine* (a).

Mr. *Beavan*, for the Plaintiff's Husband:

The VICE-CHANCELLOR:

The Testator, by his Will, gives 1,000 *l.* Consols, to Trustees, in trust for the separate use of his Daughter, for her life, and, after her death, in trust for her Children. By the first Codicil, he revokes the Bequest of

the 1,000*l.* Consols, and directs his Trustees to invest such a Sum as would produce 40*l.* a year, and to pay the same to his Daughter, for her separate use, and, after her death, to transfer the Fund to his Residuary Legatees; and he then gives her 100*l.* absolutely. By the second Codicil, he revokes the Sum of 1,200*l.*, given to his Daughter *for her life*. Now the 40*l.* a year was the only Sum to which his Daughter was entitled for her life: I think, therefore, that he intended to refer to that Sum; and, consequently, that the Gift of the 40*l.* a year, is revoked by the second Codicil.

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PILCHER
v.
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CARTER v. DEAN AND CHAPTER OF ELY.

IN November 1830, the Plaintiff proposed, in writing, to The Dean and Chapter of *Ely*, to take a Concurrent Lease of their Rectory and Manor of *Lakenheath*, in *Suffolk*, for 21 years from Michaelmas then last, at the yearly Rent of 42*l.* 10*s.* 4*d.*, under the Covenants contained in the then existing Lease (which would expire at Michaelmas 1831) and to pay, to The Dean and Chapter, a Fine of 2,950*l.* in January then next. At an Audit held on the 25th of November 1830, at which the Plaintiff and The Dean and five of the Prebendaries (who constituted a Majority of the Body) were present, the Plaintiff's Proposal was taken into consideration and accepted by The Dean and Chapter; and they caused an entry to be made, in

1834 :
6th, 8th, 10th &
11th Dec.
1835 :
13th January.

Agreement.
Specific
Performance.
Ecclesiastical
Corporation.

Time is, to a great extent, of the essence of a Contract entered into with an Ecclesiastical Corporation.

Therefore, where *A.* agreed to take a concurrent Lease of a Dean and Chapter and to pay the Fine in January, but was not ready with the Money in March following, a Bill filed by him for a Specific Performance, was dismissed with Costs.

An Entry, in the Books of a Corporation, of the terms of an Agreement entered into by them, does not bind them, although it is signed by a Majority of the Members.

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one of their books called, *The Rough Book*, to the following effect:—"Nov. 25th, 1830. The subject of the *Lakenheath* Manor and Rectory was taken into consideration, when an offer was made, by a Mr. *Carter*, for a Concurrent Lease of the same. After much discussion, the Lease was granted to him, upon paying 2,950*l.*, as a Fine for the Lease for 21 years, to be dated from Michaelmas-day last. It was finally arranged to accept the above Mr. *Carter* as our Lessee, upon the payment of the Sum before mentioned, namely, 2,950*l.* To this Mr. *Carter* consented." At the same Audit, The Dean and Chapter caused an Entry to be made, by their Registrar, in their Chapter Book, to the following effect:—"25th Nov. 1830. Agreed that a Concurrent Lease of the Manor and Rectory of *Lakenheath* be granted to *W. P. Carter, Esq.*, for 21 years from Michaelmas last. Fine 2,950*l.* Seal 2*l.*" This Entry was signed by The Dean and the five Prebendaries who were present; but it was not, nor was the prior Entry made in *Carter's* presence. A few days afterwards, *R. H. Evans*, who was the Solicitor and Agent of The Dean and Chapter, sent a Letter to a Mr. *Eagle* (who, also, had applied for the Lease), stating that The Dean and Chapter had agreed, with *Carter*, for a Concurrent Lease of *Lakenheath* Rectory.

On the 10th of December 1830, *Evans* sent, to *Carter*; the Draft of the proposed Lease for his perusal, and, on the 24th of that month, wrote to him a Letter containing the following passage: "As I understand the Fine to be paid by you for the Concurrent Lease of *Lakenheath* Rectory, is to be paid early in January, I shall be thankful to hear from you with my Draft of the proposed Lease." On the 8th of January 1831, *Evans* again wrote to *Carter* as follows: "I am desired, by The Dean, to ask you how soon you will be prepared to pay the Money for the Concurrent

lease of *Lakenheath* Rectory ; as the Members of the Chapter understood the business was to be settled in the early part of this month." On the 10th of January, *Carter* sent the following Answer: " I have not the slightest recollection that any mention was made of the early part of January for the payment of the Fine ; but I will, in the course of the present week, write you fully as to it and my other *Lakenheath* matters." On the 27th of January, *Evans* wrote to *Carter* as follows : " January (the month, certainly in which the Sum for the Concurrent Lease of *Lakenheath* Rectory was agreed to be paid,) is fast approaching to a close. On the 10th of December last, I sent you the Draft of the proposed lease : on the 10th instant, you wrote me to say that, before the end of that week, you would write to me fully as to it and your other *Lakenheath* matters. I am still without any further Communication from you. I showed your last Letter to The Dean, who desired me to express his hope you would finish the business before the end of the month. The Sum agreed for, forms part of the Audit Division for last November, which has been kept open on account of the present Sum not having come in. Allow me, therefore, respectfully to press the business upon your immediate attention." On the 31st of January, *Carter* wrote, to *Evans*, a Letter which concluded in these words : " I will, if possible, send you down the Draft on Thursday, and, so soon as it is approved and can be engrossed, I shall be ready to exchange the Money for it." On the 8th of February, *Evans* wrote to *Carter* as follows : " From the tenor of your last Letter of the 31st ult., I fully expected you would have returned me my Draft of the proposed Concurrent Lease of *Lakenheath* Rectory, which I sent you on the 10th of December last, on Thursday last, the 3d instant, according to your promise. I can assure you your delay in concluding the business relative to the proposed Purchase

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of the Concurrent Lease, has given great dissatisfaction and been productive of no little inconvenience to the affairs of The Dean and Chapter, and of actual loss to the Estate of one of the Prebendaries, who died on Saturday last, of the whole of his proportion of the Money which, as you admit, was to be paid in January last. You had been fully acquainted, by me, with the reasons that made the completion of the business so necessary. Allow me to press the matter on your immediate attention." *Carter* afterwards sent to *Evans* the Draft of the Lease; and, on the 11th of February, the latter wrote to the former, as follows: "I have got the Draft, but I do not feel myself authorized to agree to the additions you have made in it, without the consent of The Dean and Resident Prebendaries. I am, however, going to *Cambridge* to-morrow, for the purpose of meeting them at The Dean's. I will write to you as soon as the meeting is over." Again, on the 12th, *Evans* wrote, to *Carter*, as follows: "In the hopes that you can give me a meeting at your Chambers, on Tuesday morning, between 10 and 11 o'clock, I will run up to town and see you. An hour's conversation will do more than a week's writing. The Dean and Chapter are about to hold a Special Meeting in a few days, and it is, for many reasons, highly desirable the business with you should be brought to an immediate close."

At the meeting between *Carter* and *Evans* on the 15th of February, the Draft of the Lease was finally settled and signed by *Evans* on behalf of The Dean and Chapter: and *Carter* then told *Evans* that he did not expect to be in a condition to pay the Fine before June then next. On the 18th, *Evans* sent, to *Carter*, the following Letter: "I am sorry to say The Dean and such of the Prebendaries as I have seen since my return, are by no means satisfied as to the causes of your delay in paying them the Sum

which they offered to take for the Concurrent Lease of *Lakenheath* Rectory; as it was upon the faith of your paying the Money in time for it to form part of the Audit Receipts, they listened to your proposals. *If you cannot be prepared to pay before June, there will be another half year elapsed, and, of course, the calculation will have to be recast, with reference to that circumstance.*

A special Chapter will be called in the course of a very few days. I earnestly recommend it to you, therefore, to prepare yourself with the Money in the meantime. It would be in the power of any future Prebend to refuse his sanction to the completion with you upon the Terms contained in your Proposals." On the 26th, *Evans* wrote to *Carter* as follows: "A Special Chapter is summoned for the 4th of next month, at the Deanery in *Ely*, at 11 o'clock in the forenoon. I advise you, by all means, to bring your Negotiation with The Dean and Chapter to a satisfactory close before that day, or upon it at the latest. From what I know of the sentiments of several of the Members of the Chapter, I am satisfied they fully expect you will be prepared to do so. I have been waiting in the hopes of hearing from you in answer to my last Letter." On the 28th of February, *Carter* wrote, to *Evans*, as follows: "I had your Letter of the 18th. I should have written you in reply to it to-day, if I had not received your Letter of Saturday. Some indisposition and much vexation at not being able to complete my Contract as I wished, so perplex me as to preclude me the power of determining what to do. Although I could wish, just now, to be spared a journey to *Ely*, I will, if I do not hear further from you, be there on Thursday evening." On the 1st of March, *Evans* again wrote to *Carter*, urging him, by all means, to come to *Ely*.

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On the 4th of March, *Carter* went to *Ely* and attended the Special Chapter, and one of the Members of the

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Chapter then informed him that they had been, already put to great inconvenience by his having delayed to pay the Fine, as they had been prevented thereby from making a Dividend of their Audit Fines at the usual period: that a loss had been already occasioned to Mr *King* (one of the Prebendaries who died after the Meeting in November 1830) and that a loss might ensue to other aged Members of the Body; and, therefore, the Chapter had determined not to allow him any further time; and, if he did not then pay the Fine, they would not execute the Lease, but must put an end, at once, to the business then pending between them. *Carter*, in reply, said that he was not then prepared to pay the Fine, and that he could not expect the Chapter to wait any longer, nor could he expect them to come to any other determination than to put an end to the business. The Chapter then said that the Books must be closed as they could not allow further time; and *Carter* left the Meeting, without making any complaint or remonstrance. The Chapter, considering that, after what had taken place, the business between them and *Carter* was concluded, asked *Evans* whether he was willing to take the Lease on the Terms proposed by *Carter*; and *Evans* having assented, they resolved that his name should be substituted for *Carter's*, in the Lease, which had been already engrossed, blanks being left for the Name of the Lessee. The blanks were accordingly filled up with *Evans's* Name, and the Lease was executed to him. Afterwards *Carter* returned to the Chapter-room, and stated that he then recollected that he had 500*l.* at his Banker's, and pressed the Chapter to receive that Sum as part of his Fine but they declared that they thought it trifling with them and that they could not accede to his request. Upon which *Carter* said that he should expect to have the Lease, and would pursue it wherever he found it, as

threatened to file a Bill in Chancery against The Dean and Chapter, to which they paid no attention.

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On the 14th of March, *Evans* paid the Fine.

On the 16th of April, *Carter* commenced another Correspondence with *Evans*, by writing to him a Letter stating that he was then quite ready to complete his Contract with The Dean and Chapter, and that he would exchange the Money for the Lease on such day after Monday week, as *Evans* might appoint; and that, if *Evans* would send the Lease and Counterpart to his Agents in *London*, he, *Carter*, would execute the Counterpart. On the 20th of April, *Evans* sent the following Answer: "I have shown your Letter to The Dean, who directs me to express his great surprise at its contents. I assure you my surprise is equal to The Dean's. When you were present with The Dean and Prebendaries, at their Capitular Meeting at *Ely* on the 4th of last month, you were expressly told by them that the Negotiation between you and them must then be closed, on account of your acknowledged inability to pay the Money at that time. To this you assented, adding you could not expect The Dean and Chapter would wait any longer; and you were, afterwards, acquainted by me, in answer to your question to that effect, that, in consequence of what had passed at the Meeting, the Lease had been, subsequently, offered to me at the Sum which you had proposed to give for it, and that it would be sealed before the Meeting was closed. This was, accordingly, done, and the Money has been paid and divided." After some further Correspondence had taken place between *Carter* and *Evans*, but which led to no result, Mr. *Frere*, of *Lincoln's Inn*, wrote to *Evans* on the 7th of June 1831, saying that he was desired, by *Carter*, to say that 3,000 *l.* had been lodged, in his hands, for

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paying the Fine and Fees on the Lease to be granted to *Carter*, by The Dean and Chapter.

In Trinity Term 1831, the Bill was filed against The Dean and Chapter and *Evans*, insisting that there was a binding Agreement between the Plaintiff and The Dean and Chapter, and that the Lease which had been granted to *Evans*, had been fraudulently obtained by him; and praying that The Dean and Chapter might be decreed specifically to perform their Agreement with the Plaintiff; and that the Lease granted to *Evans*, might be set aside.

Sir *E. Sugden* and Mr. *Wright*, for the Plaintiff.

The entries in the Books of The Dean and Chapter, though not under their seal, bound them: for it has been decided that a Resolution entered in the books of a Corporation and signed by a majority of the body, is binding on them. *Maxwell v. Dulwich College* (a), *Marshall v. The Corporation of Queenborough* (b). The proposal was that the Fine should be paid in January 1831; but the entry of the Agreement is silent on that head. The Draft of the Lease was settled and signed by *Evans* on behalf of The Dean and Chapter, on the 15th of February, but no stipulation was made that the Money should be ready on any given day. On the 4th of March, *Carter* went down to *Ely*, and was told that, if he did not then pay the Fine, the Contract must be put an end to. This was a surprise upon him, for no previous intimation had been given to him, that he must pay the Money, or else The Dean and Chapter would rescind the Contract. *Evans* no more had the Money ready than *Carter* had. The Dean and Chapter allowed him Ten days to pay it.

(a) Treat. Eq. Book 1, ch. 4, s. 21, note. See post, 222.

(b) 1 Sim. & Stu. 520.

did they not give that time to *Carter*? Early in
he informed them that he was ready to pay the
ry. *Evans*, in his Letter of the 18th of February,

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"If you cannot be prepared to pay before June,
will be another half year elapsed, and, of course,
Calculation will have to be re-cast:" so that he
out, to *Carter*, that he would be allowed till June,
y the Money. The Dean and Chapter ought to
given reasonable Notice, to *Carter*, that he would
quired to pay the Fine on a certain day, and, if he
not complied, they then might have put an end to
Contract; but it is not the Law of this Court that
ty who has entered into a Contract, must be ready
his Money at an hour's notice.

: *Wm. Horne* and *Mr. Tennant**, for The Dean
Chapter of *Ely*:

is Dean and Chapter are a fluctuating body, and,
fore, it was very important that there should be no
r in payment of the Fine; and, after the delay
has taken place, this Court will not interfere.
in the Bill was filed, *Carter* was ignorant of the
as in the Books of The Dean and Chapter; and he
not become acquainted with them until they had
their Answer. The entries were not made in his
nce, nor were they intended to be communicated
m. They were the private Memoranda of The Dean
Chapter, and were never intended by them to con-
be a binding Agreement. Besides, a Corporation
ot be bound except by their Common Seal. *Tay-*
.*Dulwich Hospital* (c). The entry was signed by

(c) 1 P. W. 655.

Mr. Tennant appeared for *Evans* as well as for The
and Chapter.

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five only of the Members of the Body. What authority had those five individuals to bind the other Members? In *Marvell v. Dulwich College*, *Marvell* had been the Assignee of an existing Lease, and, before the expiration of that Lease, he made an Agreement with the College to take a new Lease, at an increased Rent. He had signed the Agreement and was suffered to remain in possession after the expiration of the original Lease; and he was paying the increased Rent; and, moreover, he had laid out money on the Land. It was, therefore, a case of fraud and oppression on the part of the College; and the Court must have repudiated its principles, if it had not decreed a Specific Performance of the Agreement. The Case of *Marvell v. Dulwich College* does not, therefore, contradict *Taylor v. Dulwich Hospital*. *Marshall v. The Corporation of Queenborough* stands on the same principle as *Marvell v. Dulwich College*.

Mr. Knight, for *Evans* :

The reasons why time is not regarded, by Courts of Equity, in Suits for Specific Performance, are stated in *Seton v. Slade* (d). None of those reasons are to be found in this Case. The Title was clear, the Draft of the Lease had been settled, and the Parties met to conclude the business, but the Tenant was not ready with his Money. Has a Court of Equity ever enforced an Agreement under such circumstances?

In the course of this Suit, all the Members of the Chapter may be changed; and, therefore, the Court would reluctantly interfere, if there has been any Laches or default on the part of the Plaintiff. There is no evidence whatever that the Plaintiff ever had the means of paying the Fine. In November 1830, he held

(d) 7 Ves. 265.

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at to The Dean and Chapter, who are a fluctu-
dy and to whom punctuality was of the greatest
ce, that he should be ready with the Money
ry 1831; and, on the 31st of that month, he
, *Evans*, saying that, as soon as the Draft of
e could be engrossed, he should be ready to
: the Money for it. He was repeatedly pressed,
s, for the Money; and, in March 1831, when
ut to the test, he said that he had only 500 *l.*
mker's, and asked The Dean and Chapter to
hat Sum in part of the Fine. Besides, in Sales
sionary Interests, the Court is more precise, as
than in Sales of Interests in Possession. *New-*
Rogers (e). For the Parties are dealing with
: which varies, in value, every moment. Here,
Lessors are a fluctuating Body, and the Money
e divided amongst individuals, who, by death,
se all participation in it: one of the Preben-
ldie between November 1830 and March 1831.

is no Case that decides that, if a Party is not
th his Money at the time appointed for com-
he Contract, he has a right, some months
ls, to file a Bill for a Specific Performance of
ract. If there were no particular circumstances
ase—if it were a Contract between individuals,
rt would say that the Plaintiff, by his own
has lost the benefit of his Contract.

: VICE-CHANCELLOR:

aterial question (but which I will not decide
it) is whether there was, at any time, a Con-
ch bound the Corporation? If the Signature
ve Members of the Corporation to the Entry

(e) 4 Bro. C. C. 391.

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made in the Chapter Book on the 25th of November 1830, bound the Corporation, so as to make a tract, then, as a matter of course, an Action might be brought against them, and Damages might be recovered for the non-performance of the Contract.

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The VICE-CHANCELLOR :

The first question is whether there was any Agreement which, in point of Law, could bind The Dean and Chapter. It is insisted that they were bound by the Entry which is to be found in their Chapter Book. I take that Entry and the Entry in The Rough Book to be all one for that purpose.

It was said that it has been decided that, where a Majority of an Eleemosynary Body Corporate, enter into their Books, a Resolution that they will grant a lease of their Property, it constitutes such an Agreement that this Court will specifically execute: and the Decision in the Case of *Marwell v. Dulwich College* was relied on as an Authority for that proposition. The question is whether *Marwell v. Dulwich College* is an Authority to that effect. I have, for the third time, read over an Extract of that Case from the Registrar's Book, and being able to make out that it is at all parallel to the present Case.

*Marwell v.
 Dulwich College.*

It appears that, in 1773, The College, who were incorporated by Letters Patent in the Reign of James the 1st, granted a Lease of a House and Garden to *James Rowles*, for 21 years from Michaelmas 1773, at the yearly Rent of 14*l.* There was a Walk through a Wood which belonged to The College, and which lay in front of the House; and the Lease contained a proviso that The College, whenever they cut down

own and the half Rood preserved. In 1774 the
iff, *Marwell*, became the Assignee of the Lease;
oon afterwards, as the Bill alleges, laid out consi-
e Sums, in necessary repairs of the demised Pre-
in full confidence of a Renewal of the Lease
granted to him at the expiration of it, as had been
The Lease expired at Michaelmas 1780, and,
pon, *Marwell* applied, to The College, for a Re-
; but The College refused to renew unless he
agree to pay a Rent of 22*l.* for the Premises.
ell agreed to pay the increased Rent, and, as the
presents, to take a Lease of the Premises for 21
from Lady-day 1781, subject to the same Cove-
as were contained in *Rowles's* Lease; and, there-
The College caused an Order to be entered, in
books, which, according to the statement in the
was that *Marwell* should have a new Lease ac-
g to the Proposal and Agreement. The Bill then
; that The Master, who always insisted on pre-
the Leases granted by The College, prepared a
which *Marwell* found, on perusal, omitted the
ay or Walk through the Wood, and also the word
ns,' in the *Habendum*, and contained a Covenant,
Plaintiff, to insure, which was not in *Rowles's*
; and, thereupon, *Marwell's* Solicitor, on the 16th
il 1781, applied to The College to have the Draft

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executed the Counterpart ; but the Seal of The College was not put to the Original. On the 16th of June 1781, The Warden and Fellows entered and signed a Protest, in one of their Books, against what they termed the arbitrary proceedings of The Master, who, as they asserted, had acted from private pique against *Marwell*, and in direct opposition to the Statutes of The College, which invested the Majority of the Corporation with the controlling power. The Bill further stated that, on the 28th of January 1782, The College received, from *Marwell*, the Rent for the Walk, together with 11*l.*, in full of all Rent due to them on Michaelmas-day 1781 : and it prayed that The College might be decreed to execute, to the Plaintiff, a Lease pursuant to the Proposal and Agreement before stated.

The College, in their Answer, admitted that a Lease in the terms stated in the Bill, had been granted to *Rowles* ; and that the Plaintiff took possession of the Premises under colour of some Assignment of such Lease, and that he might have laid out some Money on the Premises ; and that they refused to grant him a new Lease, unless he would agree to pay the Rent of 22*l.*, and, if he had not complied, they should have turned him out of possession. They said that, on the 5th of March 1781, the following Entry was made in one of their Books : “ Ordered that *Charles Marwell* shall have a new Lease of the Premises he now holds of The College, consisting of about 10 acres of Land, Dwelling-house and Appurtenances, to commence at Lady-day next, for the term of 21 years, at the yearly Rent of 22*l.*, with the usual Covenants, and such other Covenants as The Master, Warden and Fellows shall appoint ;” and that *Marwell* signed his name to the following Agreement under the Order : “ I do agree and comply with the preceding,

and, on the foregoing Conditions, will accept the Lease and execute a Counterpart on demand:" that, in consequence of such Order and Agreement, a Draft of a Lease was prepared by The Master, with the omissions and addition mentioned in the Bill, and which the interests of The College (which The Master was bound, by his oath, to promote) required: that *Maxwell* had regularly paid the Rent reserved by the old Lease, from the time when he alleged that he had purchased the same, to the time of its expiration, and, from that time, to the 29th of September 1781: that The College had, ever since *Maxwell's* alleged purchase of that Lease, deemed him as Tenant of the Premises and accounted him as such; nevertheless on such terms only as were expressed in the Draft prepared by The Master: that the acts in the Bill in that behalf stated, were done by The Warden and Fellows, but that The College were not bound thereby, as the same were not done as Corporate Acts: that the then Majority of The College were convinced that the Lease ought not to be granted to the Plaintiff, on the terms insisted on by him: and *they submitted whether, under the said Agreement and the circumstances aforesaid, they ought to grant a Lease, to Maxwell, on the terms mentioned in the Bill or on what other terms.*

Now it is observable that *Maxwell* states, in his Bill, that, after the old Lease had expired, he paid the *increased Rent* of 22*l.* And, although The College do not admit the fact in their Answer, they state what appears to be equivalent; for they admit that they refused to renew the Lease unless *Maxwell* would agree to pay the increased Rent, and that, if he had not complied, they should have insisted on turning him out of possession. The fact, however, is that he remained in possession; and I must suppose that he remained in pos-

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session by virtue of doing that which, if he had not done, he would have been turned out of possession. Besides, if he had not paid the increased Rent, The College, of course, would have so alleged in their Answer. Therefore, it may be fairly taken, as a fact, that he did pay the increased Rent. The College did, unquestionably, take, from him, an Obligation to pay the Rents because they procured him to sign the Agreement which was written under the Order of the 5th of March 1781. The Answer admits that, ever since *Marwell's* purchase of the Lease, The College had deemed him as Tenant of the Premises and accounted him as such, nevertheless, on such terms only as were expressed in the Draft prepared by The Master. It is alleged, in the Entry made in College Books on the 16th of June 1781, that the Corporation was so constituted as that the Majority should have the controlling power; but whether that is the fact, we have no means of ascertaining.

I caused application to be made, to the Registrar's Office, in order to find out whether the Answer was replied to, and I have been informed that it was.

The Cause was heard on the 14th of July 1793, before The Lords Commissioners, Lord *Loughborough*, Sir *W. H. Ashurst* and Sir *B. Hotham*; and the Decree was drawn up in the following words: "Whereupon and upon debate of the Matter and hearing the Agreement dated the 5th day of March 1781, read, and what was alleged by the Counsel on both sides: Their Lordships do declare that the Agreement bearing date the 5th day of March 1781, for a Lease of the Premises in question, ought to be specifically performed and carried into execution, and do order and decree the same accordingly: And it is further ordered that it be

referred to Mr. *Halford*, one of the *Masters* of this Court, to settle a Lease between the Parties according to the terms of the said Agreement."

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Now, in my opinion, The Lords Commissioners might very fairly hold that, independently of the general Law, the particular circumstances of this Case were such as to make it just and right to compel The Corporation to grant a Lease to Mr. *Marwell*. And I cannot think that this Decision can be considered as impugning, in the least, that which I take to be the clear Law of the land, namely, that Eleemosynary and Ecclesiastical Corporations are not bound by anything in the shape of an Agreement regarding their Lands, unless it is evidenced by a Deed or Writing with their corporate Seal affixed to it. And I confess that I feel so strongly that to be the Law of the land, that, if the Case of *Marwell v. Dulwich College* had been weaker in its circumstances for procuring a Decree for a Specific Performance to the Plaintiff, than it is, I should not have felt myself bound by it.

That Case was very strongly urged, by Sir *E. Sugden*, when he argued the Case now before me; but I could not help noticing that, both in the Opening and, certainly, in the Reply, he shrunk from a very critical examination of the singular circumstances which are contained in that Case.

I will now return to the Case before me. There is not any *evidence* that the Plaintiff was, at any time, ready to pay the Fine. I consider that, where a person is dealing with an Ecclesiastical Corporation, time must, of necessity, be, in a very great degree, of the essence of the Contract; especially where the Plaintiff is not

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dealing for the purchase of a Fee-simple Estate in Possession, (in which case, the Interest of the Purchase-Money is considered as an equivalent for the Rents and Profits) but for a Concurrent Lease; in which case the lapse of every day changes the value and nature of the thing to be granted, and changes also the persons who are to participate in the Sum to be paid. That it was so in this Case, is beyond all doubt, because Mr. King, one of the Prebendaries, died between the 25th of November and the 4th of March; and, since the 4th of March, two of the other Prebendaries have died. Therefore, it would be the grossest injustice to hold that the Agreement of The Dean and Chapter is to be treated in precisely the same manner as the Agreement of a single individual, the effect of which would be to give the benefits of the Resolution, not to those persons who signed it in the expectation of participating in the benefits of it but to their Successors. I think, therefore, that non-payment of the Consideration, is, of itself, fatal to the Plaintiff's Case.

I also think that what took place on the 4th of March 1831, is a decisive Answer to this Bill. Because Mr. Carter, at his first interview with The Dean and Chapter on that day, declared that he was not ready to pay the Fine, (and, according to his own representation, he was not, at any time on that day, able to pay more than the Sum of 500 *l.*) and The Dean and Chapter then said that there must be an end of the Negotiation; upon which Carter left the room without making any complaint or remonstrance: and my Opinion is that, from that moment, The Dean and Chapter were utterly absolved.

What took place afterwards is of very little importance. For no further attempt was made to represent

that there was a possibility of the Money being ready, until Mr. *Carter* wrote the Letter of the 16th of April; and, even then, he does not propose to pay it till some day after the Monday week. Indeed, there is no *evidence* that the Money was ready to be paid at any time whatever, for Mr. *Frere*, who wrote the Letter of the 7th of June, was not examined, as a Witness, to prove the fact that he had the 3,000 *l.* in his hands.

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Therefore, the Case, as against The Dean and Chapter, fails in every respect. And I wish to have it understood that I rest my Judgment on all the grounds which I have stated. First: the Entries in the Books of The Dean and Chapter did not constitute an Agreement which was binding upon them. Secondly: The conduct of Mr. *Carter* in holding out, when he was dealing with a Body that was fluctuating in its nature, that he should have the Money ready in the month of January, but not being prepared with it on the 4th of March, (which was after the lapse of more than a fortnight from the time when the Drafts were completely settled by himself as well as by Mr. *Evans*) is, of itself, a reason why The Dean and Chapter should not be held bound. And, Thirdly: Mr. *Carter's* conduct on the 4th of March, would have absolved The Dean and Chapter, if there ever had been any Agreement that was binding upon them.

Then it was said that *Carter* was induced to expect that further time would be given him; and that is rested upon a passage in Mr. *Evans's* Letter of the 18th of February. Now, in that Letter, Mr. *Evans* says: "If you cannot be prepared to pay before June, there will be another half year elapsed, and, of course, the Calculation will have to be recast with reference to that

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circumstance." Now, if there was to be a departure from the original Valuation, what was the Sum that ought to have been paid? That does not appear; and, therefore, on Mr. *Carter's* own showing, his Case must fail; because this Letter cannot be taken in the sense of a mere Postponement of Payment; for Mr. *Evans* says, if there be a Postponement, it must be accompanied with the circumstance of a recasting of the Calculation. The Letter then proceeds thus: "A Special Chapter will be called in the course of a very few days. I earnestly recommend it to you, therefore, to prepare yourself with the Money in the meantime. It would be in the power of any future Prebend to refuse his sanction to the completion with you upon the terms contained in your Proposals." And *Evans*, in his subsequent Letter, urges *Carter* to come, to *Ely*, prepared with the Money. It cannot, therefore, be said that there has been any giving of time in this Case.

His *Honor* then observed upon the Charges of Fraud made, by the Bill, against Mr. *Evans*, and said that they were most unjust and improper, and that Mr. *Evans* had conducted himself with the utmost fairness to Mr. *Carter*. His *Honor* concluded by dismissing the Bill as against Mr. *Evans*, as well as The Dean and Chapter with Costs.

MEMORANDUM.

In December 1834, Sir *E. B. Sugden* was appointed Lord Chancellor of *Ireland*, on the Resignation of Lord *Plunket*, and was sworn in a Member of the Privy Council.

PHILIPPS v. CLARK*.

1833:
28th February.

*Supplemental
Bill.
Conduct of Suit.*

THE Plaintiff was interested in One-eighth Share of the Residuary Personal Estate of *Richard Thornton*. The remaining Residue was distributable, in certain Shares and for certain Interests, amongst different Persons exceeding 20 in number. In Hilary Term 1831, the Plaintiff filed his Bill, against the Executors of *Richard Thornton* and the other Persons interested in the Residue, praying for an Account of the Residue and for payment of his Share. On the 11th of July 1832, the usual Decree was made in the original Cause and in a Supplemental and Revived Cause which had become necessary by the Bankruptcy and Death of some of the original Defendants. On the 21st of July 1832, before The Master had made his Report, *John Cumberland Altham*, one of the Defendants in the original Cause and a Residuary Legatee in right of his Wife, took the benefit of the Insolvent Debtors' Act, and the Defendant *Richard Clark* was appointed Assignee of his Estate and Effects. On the 24th of August 1832, *Clark* applied, to the Executors, for payment of what was due, to the Insolvent, from *Richard Thornton's* Estate. At a meeting of the Creditors of the Insolvent on the 31st of August 1832, *Clark* was empowered to institute Proceedings in Equity to recover the Monies to which *Altham* was entitled in right of his Wife. By a Letter dated the 5th of September 1832, the Executors promised to call upon the Assignee and settle the claim, within a given time. The Executors having failed to keep their engagement, *Clark*, on the 21st of November

After Decree, one of the Defendants became insolvent, and his Assignee, without Notice to the Plaintiff, filed a Supplemental Bill against all the Parties to the Suit. Afterwards the Plaintiff filed a Supplemental Bill against the Assignee alone. A Motion, by the Assignee, that the Plaintiff's Supplemental Bill might be taken off the file, for Irregularity, was refused.

* Ex Relatione.

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1832, without any previous Notice to *Philipps*, the Plaintiff in the original Cause, filed a Bill in nature of a Supplemental Bill, against him and all the other Parties in that and the other Suits in which the Decree was made, praying that he might have the benefit of those Suits and of the Decree and Proceedings therein, and that the Share of the Residue to which *Altham* was entitled in right of his Wife, might be paid to him, *Clark*, as such Assignee as aforesaid. On the 23d of November 1832, *Philipps*, the Plaintiff in the original Suit, appeared to *Clark*'s supplemental Suit, and, on the 10th of December following, *Philipps* filed a Supplemental Bill against *Clark* only, praying the usual Decree in such Suit. *Clark*, afterwards, obtained the common Order for time to plead, answer or demur not demurring alone, to *Philipps*'s Supplemental Bill. On the 28th of February 1833, *Clark* moved that *Philipps*'s Supplemental Bill might be taken off the file for Irregularity.

Mr. Knight and Mr. Sharpe, for the Motion :

Clark has no desire to deprive *Philipps* of the conduct of the Cause; but the Defendants in *Clark*'s Suit, insist on being paid their Costs if that Suit is abandoned. *Clark* was perfectly regular in filing his Supplemental Bill, and cannot be liable for those Costs. He has no alternative but to make this Application, for which *Livesey v. Livesey* (a) is a direct authority. The Practice of the Court does not admit of two Suits having for their object the continuance, merely, of an existing Suit.

Mr. Wigram, for *Philipps* :

A Plaintiff has always a right to the conduct of his own Cause; and, where two Suits are for the same ob-

(a) 1 Russ. & Myl. 10.

ject, and each is instituted by a Party having a right to do so, the Court will not stay either, until a Decree is made in one of them. *Livesey v. Livesey* was a Case in which each of two Co-plaintiffs in an original Suit, filed a mere Bill of Revivor. Their rights to the conduct of the original Cause, were equal, and neither could be prejudiced by the other filing the Bill; because a common Order to Revive was all that was necessary, and there was no occasion to bring the Cause to a Hearing; and that Order could, certainly, be obtained within a given time. The case is different where a Supplemental Bill is necessary; for, in that case, the Cause must be brought to a Hearing and a Decree made. In this Case, *Philipps* can obtain a Decree as soon as *Clark's* Answer is filed. In *Clark's* Suit, the Answers of all the Defendants in the original and supplemental and revived Suits, must be got in, before the Cause can be heard. If *Clark* is right in his Motion, a Defendant whose interest it is to delay the prosecution of a Decree, may, by filing a Supplemental Bill, effect that purpose. *Clark* should have applied to the Plaintiff *Philipps*, before he filed his Bill.

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CLARK.

Clark by taking an Order for time cannot now say that *Philipps's* Bill is irregular.

Mr. *Knight* in reply:

A common Order to revive is not sufficient after Decree. There must be a Decree in the Suit for Revivor; which makes *Livesey v. Livesey* an authority in point.

The VICE-CHANCELLOR:

I am of opinion that there is a material distinction between a case like this, in which a Supplemental Bill is necessary, and a case like *Livesey v. Livesey*, in which

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a common Bill of Revivor, alone, was necessary. In the former case, the Cause must be prosecuted to a Bill and a Decree must be obtained. *Livesey v. Clark* does not, in my opinion, apply to the present case. *Clark* should have applied to *Philipps*, before he instituted his Suit. He has brought the evil on him by omitting to do so.

I do not agree in the proposition that more common Order to revive, is necessary after a Bill. At all events, if *Philipps's* Bill had been in time, *Clark* has precluded himself from raising the objection by obtaining an Order for Time.

1835:
19th January.

Infant.
Next Friend.

A Bill filed on behalf of an Infant, ordered to be taken off the file, with Costs to be paid by the Next Friend, he being a Person in low circumstances, and of immoral character, and there being no reason to suppose that he had instituted the Suit from spite against one of the Defendants.

WALKER v. ELSE.

THE Testator in this Cause died in 1833, leaving a Wife and an infant Daughter by a former Marriage, his only Child and Heir-at-Law him surviving. Will he gave all his Real and Personal Property to his Wife, subject to her maintaining and educating his Daughter during her infancy, and, on his Daughter attaining 21, he gave to her one of his Farms, with Remainder to her Children, and appointed his Wife and the Trustees and Executors of his Will to be Guardians of his Daughter.

On the 6th of August 1834, a Bill was filed, by *Parkin* as Next Friend to the Infant, against the Testator's Widow and the Executors and Trustees.

his Will, containing Allegations prejudicial to the Widow's character, and praying for the usual Accounts of the Testator's Estate, and that the Widow might be removed from the Guardianship of the Infant. On the 20th of October 1834, the Widow filed a Bill against the Trustees and Executors and the Infant, praying that the Will might be established and the Trusts of it performed.

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A Motion was then made, on behalf of the Widow, either that the Bill in the first Suit might be taken off the file with Costs to be paid by *Parkin*, or that it might be referred to The *Master* to inquire and state which of the two Suits was most for the Infant's benefit.

The Affidavits stated that *Parkin* had been a day-labourer in the Widow's service, at wages of 12s. a week, and had been discharged by her: that he had deserted his Wife and Children, and was then living in adultery with another Woman.

The Motion was heard in His *Honor's* Private Room, either in Michaelmas Term 1834 or in the following Sittings.

Sir *E. Sugden* and Mr. *James Parker* appeared in support of the Motion.

Mr. *Knight* and Mr. *Faber*, for *Parkin*.

THE VICE-CHANCELLOR:

This Motion was heard in my Private Room; but, as the point is of considerable importance, I have thought it right to deliver my Judgment in open Court.

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His *Honor* then detailed the facts stated in the affidavits relative to *Parkin*, and said: It is in fact that a Suit conducted by a Person of such a character can be well conducted. Where a Suit is instituted on behalf of an Infant, it should be manifest to the Court that the Next Friend is likely to conduct the Suit for the benefit of the Infant. It is reasonably probable from the facts stated in the Affidavits, that the first Cause, was filed, not for the benefit of the Infant, but to gratify a spite entertained by the Next Friend against the Testator's Widow, because she had discharged him from her service. It appears also that the Defendant is a Person in low circumstances, and, therefore, no security for his being able to pay the Costs of the Suit, in case it should be allowed to proceed, should be, ultimately, ordered to pay them.

The Bill, therefore, must be taken off the docket. The Costs to be paid by the Next Friend.

1835:
15th January.

GULLIN v. GULLIN.

Feme Covert.
Infant.

A MARRIED Woman, under 21, petitioned for a Sum in Court, amounting to 200*l.*, to which she was entitled, might be paid to her Husband.

The Court will take the Consent of a Married Woman, though a Minor, to the payment of a Sum to her Husband, which she is entitled.

The *Vice-Chancellor* said he thought that the Court should not grant a Sum to a Married Woman, though a Minor, had been on a former occasion; and, on the Lady appearing, consenting, His *Honor* made the Order.

THE EARL OF SHAFTESBURY v. THE DUKE
OF MARLBOROUGH.

1835:
15th January.

*Legacy.
Legacy-Duty.*

THE late Duke of *Marlborough* devised, certain of his Estates, to Trustees, for 500 years, in Trust, after his decease, to pay, out of the Rents, to his Grandson, the present Marquis of *Blandford*, at his age of 21, if his father, the present Duke, should be then living, the clear yearly Sum of 1,000*l.*, by four equal quarterly payments, until he should attain 25, if his Father should so long live, and, as soon as he should attain that age, if his Father should so long live, to pay to him, during the life of his Father, the clear yearly Sum of 2,000*l.*, by like equal quarterly payments. In a subsequent part of his Will, the Testator directed his Executors to pay the Legacy-duty on all the Legacies and Annuities *thereby* given.

Testator by his Will gave an Annuity to his Grandson, and directed his Executors to pay the Legacy-duty on all the Legacies and Annuities given by his Will. By a Codicil, he gave an Annuity to his Grandson *in lieu* of the Annuity given by his Will. Held that the Annuity given by the Codicil, was free from Legacy-duty.

The Testator, by a Codicil, after reciting the devise to the Trustees in Trust to pay the Annuities, expressed himself as follows: "Now I do hereby revoke the said two yearly Sums of 1,000*l.* and 2,000*l.* in my said Will named to my said Grandson, and, *in lieu thereof*, I direct my Trustees possessed of the said Term, to pay, by and out of the Rents, Issues and Profits of the said Hereditaments comprised in the said Term of 500 years, unto my said Grandson, the clear yearly Sum of 3,000*l.*, to commence from the day of my death, by four equal quarterly payments, and to continue payable during the life of his Father."

On the hearing of a Petition presented by The Marquis of *Blandford*, the question was whether the Annuity given by the Codicil, was free from Legacy-duty.

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MARLBOROUGH.

Mr. Rolfe and Mr. J. Romilly, for the Petitioner,
cited *Cooper v. Day* (a), and *Byne v. Currey* (b).

Mr. Jacob, for the Trustees.

The VICE-CHANCELLOR :

When the thing bequeathed by the Codicil, is given as a mere substitution for that which is bequeathed by the Will, it is to be taken with all its accidents. Therefore, the Legacy-duty on the Annuity given by the Codicil, must be paid out of the Testator's Residuary Estate.

(a) 3 Mer. 154.

(b) 2 Crom. & Mees. 603. S. C. 4 Tyrwhitt's Rep. 478.

1835:

15th January.

Feme Covertæ.
Maintenance.

Part of the Capital of a Fund in Court, belonging to a married Woman, who was deranged and had been deserted by her Husband, ordered to be applied for her Maintenance.

PETERS v. GROTE.

A MARRIED Woman, entitled to a Fund in Court standing to the Account of herself and her Husband, was of unsound mind, and had been placed, by her Husband, in a Lunatic Asylum. In August 1833, he obtained an Order, on Petition, for payment to him of 800 £, out of the Capital of the Fund, for the purpose of paying a Debt incurred, to the Proprietor of the Asylum, on his Wife's account. He applied part of the Money for that purpose, and the Residue to his own use. Afterwards he went to *Jamaica*, where he held a lucrative appointment under Government. The Proprietor of the Asylum being unable to obtain any further payment from the Husband, the Lady's Brother, who was a Defendant in the Suit, presented a Petition stating to the effect before-mentioned, and that the Lady had

no Property except the Fund in Court, and that no Settlement was made on her Marriage, and praying that a further part of the Capital of the Fund, might be sold and the proceeds paid, to the Proprietor of the Asylum, in discharge of the Debt then due to him.

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Mr. *Knight* appeared in support of the Petition*.

The *Vice-Chancellor* made the Order.

* The Petition had not been served on any one.

SIGEL v. PHELPS.

THIS Suit was instituted by a Husband and Wife, for the purpose of having the Arrears of an Annuity given to the Wife for her separate use, paid to her, and for the appointment of new Trustees of the Estates charged with the Annuity, and for a Receiver.

1835 :
19th January.

Pleading.
Parties.
Husband and
Wife.

The *Vice-Chancellor* was of opinion that, as the Suit related to the Wife's separate Property, she and her Husband ought not to have been made Co-plaintiffs, but the Bill ought to have been filed by the Wife, by her next Friend, and the Husband ought to have been made a Defendant. And His *Honor* intimated that the Bill must be dismissed, unless the Defendants would consent to the Decree proposed to be taken.

Husband and Wife ought not to join as Co-plaintiffs, in a Suit relating to the Wife's separate property, but the Bill ought to be filed by the Wife alone, by her next Friend.

The Defendants having consented, the Decree was made.

1845.
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 1848.

Mr. Knipe and Mr. Haines appeared for the
 defendants, and Mr. Haines, Mr. Knipe and Mr. E.
 Knipe for the Plaintiffs. The following Cases
 were cited: *Parker v. Dismore*, *Hughes v. Eve*,
Brown v. Doulton.

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1849. Vol. 10. 1850.

1850. Vol. 10. 1851.

DREVER v. MAUDESLEY.

1845:
 1846 January.

Practice.
Exceptions.
Separate Report.

Where a Party
 to a Suit objects
 to a separate
 Report, he must
 except to it, in
 the usual man-
 ner, and not by
 Petition.

IN this Cause a question arose whether, if a Pa-
 a Suit objected to a *separate* Report, he could
 Exceptions to it in the usual manner, or whether
 not necessary for him to present a Petition statu-
 Objections and praying for Leave to except.

The *Vice-Chancellor*, after conferring with the
 Registrar, ruled that, where a Party to a Cause objec-
 a Report, whether it was *separate* or *general*, he
 file Exceptions to it in the usual manner.

THE ATTORNEY-GENERAL v. ST. JOHN'S
COLLEGE.

1835 :
19th and 21st
January.

Demurrer.
Multifarious-
ness.
Parties.

THE Information was filed against the Master, Fellows and Scholars of *St. John's College, Cambridge*, the Rev. *Thomas Shield* and the Rev. *Thomas Brown*, the Master and Usher of *Pocklington School* in *Yorkshire*, and the Vicar and Churchwardens of the Parish of *Pocklington*. It stated that, by Writ of Privy Seal dated the 4th of May, 6th Hen. 8, Licence was granted to *John Dowman*, Doctor of Laws, to found and endow, within the Parish Church of *Pocklington*, a Fraternity or Guild of a Master and two Guardians and Brethren and Sisters, to be incorporated by the name therein mentioned ; and also to grant to the Master and Wardens of the Guild, Lands to the value of 20 Marks, to find a fit man, sufficiently learned in Grammatical Science, to instruct all Scholars, resorting to the Town of *Pocklington* to be taught, according to the Statutes and Ordinances of the said *John Dowman*, and to perform other works of Piety, at the discretion of the Master and Guardians, and to maintain other Duties, from time to time, incumbent on the Fraternity or Guild : That, pursuant to the charitable intent with which *Dowman* obtained such Licence, he built, in the

J. D. founded a School and gave Lands, to a Guild or Fraternity, for providing a Master for the School. Some years afterwards, he gave Lands to a College, on condition of their maintaining five Scholars, to be chosen by the Guild, from the School : and he directed that the Master of the School should be chosen and removed (when necessary) by the Guild, with the advice of the Master and Fellows of the

College. By an Act of Parliament, the Guild was dissolved, and the electing of the Scholars to be sent to the College, was given to the Schoolmaster and the Vicar and Churchwardens of the Parish ; and the appointing of the Schoolmaster, was given to the College, and, on their default, to the Archbishop of York. Held that the School and the Scholarships, were distinct Foundations ; and, therefore, that an Information relating to abuses in both of them, was Multifarious, and that the Archbishop ought to have been made a party to it.

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Town of *Pocklington*, a School-house, and liberal endowment established the same, as a Free Grammar school, for the benefit of the Inhabitants of *Pocklington* and its vicinity; and he enfeoffed divers Persons, whom his Nephew, *Thomas Dowman*, was one, of the School-house, and, also, of divers Real Estates, upon Trust for the Maintenance of the School: That *John Dowman* was also desirous that a sufficient number Scholarships should be endowed, in *St. John's College Cambridge*, for the benefit of Scholars who should be educated in his School at *Pocklington*; and, accordingly he, being seised of certain Lands, determined to convey the same to The Master, Fellows and Scholars of the College, for the Endowment of such Scholarships; and inasmuch as the last-mentioned Lands were then of the clear value of 15 *l.* per annum, and the Sum of 3 *l.* per annum was, at that time, deemed a competent Provision for the Board and Maintenance of a Scholar in the University, he appointed that five Scholarships only should be endowed; and, for effecting such purpose a Deed bearing date the 1st of December, 17th Hen. 8. was made between *John Dowman* and the Master, Fellows and Scholars of the College, to the effect following*: "To all faithful Christians &c. Know; that I, the aforesaid *John Dowman*, have given and granted, to the Master and Fellows and Scholars of the College of *St. John the Evangelist*, in the University *Cambridge*, all my Lands and Tenements &c. situated and lying &c., and which Lands and Tenements &c. extend to the yearly value of 15 *l.* beyond reprises, to the intent that they and their Successors shall bear and for ever observe certain charges according to my Ord

* The Deed set forth in the Information was a translation of the original, which was in Latin.

nances and Dispositions hereinafter to be limited and declared as follows: I will and ordain that the aforesaid Master, Fellows and Scholars cause to be incorporated, among the other Statutes which, by the Executors of *Margaret*, late Countess of *Richmond* and *Derby*, Foundress of the same College, are ordained, certain Statutes and Ordinances for the five Scholars of me, *John Dowman*, in the same College, at all future times for ever, to be sustained, besides the above-mentioned Scholars for the Foundress aforesaid and for other Benefactors instituted or hereafter to be instituted; and these five Scholars shall be nominated by me to the College aforesaid, of whatsoever County I will, during my natural life, and, after I shall have departed from this world, I will and ordain that the nomination of the said five Scholars, for all future times, shall appertain to the Master, Wardens and Brethren of the Fraternity or Guild, in the Parish Church of *Pocklington*, by me lately founded: And I will and ordain that these five Scholars be chosen and received, into the same College, by the Master, Fellows and Scholars thereof, according to the form, manner and time which are ordained for the yearly Election of the Scholars of the Foundress, in the Statutes of the same College: and that these five Scholars shall have equal emoluments, commodities and advantages with the Scholars of the Foundress, because the Rents and Possessions and other Tenements by me given and bestowed upon the same College, for this purpose are sufficient, and, with these Tenements and other the Premises the said Master, Fellows and Scholars are well contented and satisfied: also I will and ordain that these five Scholars be born within the City of *York*, and, above all things, that those Scholars be elected who are of my Kindred and Surname, where-
soever they shall have been born, if such shall be found,

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any where, sufficient for the purpose ; otherwise, I ordain that such Scholars be always elected who shall have been taught and educated at my Grammar School of *Pocklington*, of whatsoever County they may be Natives, especially however if any have been there born where the Lands and Possessions aforesaid lie, and be, for the purpose, more able and more excellent than others ; nor, however, may they be taken elsewhere than from my School aforesaid, and unless of those, simply, the best Scholars in Grammar of that School, and of those who are more excellent and more distinguished in morals ; provided always that they possess suitable qualities and morals and learning, according to the Statutes of the same College ordained for the Scholars of the Foundress ; and, immediately that they shall have been elected and admitted in the said College, they shall take such and the like Oath which and as the Scholars of the Foundress for the time being shall take and have taken, in conformity with whom they shall conduct themselves in every respect according to the obligation of the Statutes : and, further, I Will and Ordain that the Master and Fellows and Scholars of the aforesaid College, shall make premonition, to the Master and Wardens of the aforesaid Guild, within six Weeks of every Vacation of any Scholar of my Foundation in the same College, that the aforesaid Electors may nominate another or others. But because the skill of the Master of the School aforesaid, unless fortified by good morals and virtue, cannot alone suffice, neither can the qualification of these be sifted, by any means fully, by the Master, Wardens and Brethren of the Fraternity or Guild aforesaid, I will and ordain that whatsoever Master of the aforesaid College, or Fellow sent by the Master of the same College, shall happen to approach the said Town of

Pocklington, he shall go to the same Town, shall enter my said School there, shall salute the Master of the same School, or, he being absent, shall cause him to come to the School, and shall diligently examine him, whom, if he shall have found blameworthy or unfit in morals or knowledge, he shall cause, within a term, to depart, and shall see that another more skilful, or more distinguished in morals than he, be, with all dispatch, elected by the Master and Wardens of the said Guild, as well to the advantage and honour of his College as for the confirmation and full effect of this my Will, as having perceived that, by his carelessness or negligence, the duty is not properly discharged. If they shall find not many or no Scholars there, fit to be elected thence to their College, let them consider this fault is to be charged, not so much to the defect of my Ordinance, as to themselves and their own want of attention; with which view it is that I have decreed it to be here also added and inserted, that which I have ordained both in the Statutes of my Guild and School, to wit, that every Master of the aforesaid School (their office there becoming vacant by death, resignation, motion or other means whatsoever,) shall be elected, instituted and confirmed, by the said Master, Wardens and Brethren of the same Fraternity or Guild, with the mature counsel of the aforesaid Master of the College and of the Fellows, and likewise as is aforesaid, if he must be dismissed, that he be dismissed with the counsel of the Master and Fellows of the College aforesaid: and I will, if default be made by the said Master, Fellows and Scholars in not admitting or not well governing, treating or sustaining my said Scholars presented to them from my said School, that all the right, title &c. of the aforesaid Master, Fellows and Scholars in the aforesaid Lands &c., be altogether void and

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cease, and, thenceforth, that all the aforesaid Lands & shall remain to the Master and Scholars of *Christ Church College* in the University of *Cambridge*, under the same condition and to the same intent, uses and purposes for which it has been above declared by me to the Master and Fellows and Scholars of the College of *St. John the Evangelist*, as well for the support as for the admission of my said Scholars of *Pocklington*, and not otherwise.

The Information further stated that, by an Act of Parliament passed in the fifth year of Edward the Sixth, after referring to the erection of the School and the establishment of the five Scholarships, and the dissolution of the Fraternity or Guild in the first year of the same King's reign, and reciting that *Thomas Dowman*, the Nephew of *John Dowman*, was then seised in fee, as well of the School-house as of the Lands and Tenements purchased, by *John Dowman* for the maintenance of the School, without any will declared, so that, if he should die, it was not certain that the Lands would be employed unto the use aforesaid, as theretofore they had been; it was enacted that it should be lawful, to the Master and Fellows of *St. John's College* and their Successors, to appoint a Schoolmaster of the School, from time to time, and that it should be lawful, for the Schoolmaster with the Churchwardens of the Parish Church of *Pocklington*, to appoint the Usher of the School, from time to time, and that the Master and Usher should be incorporated and enabled to receive, in perpetuity, of the Gift and Grants of *Thomas Dowman* and other persons, Lands and Tenements of the clear yearly value of 20 *l.*, and that as often as any of the rooms of the five Scholars within the College should be vacant, it should be lawful for the Master of the School, together with the Vicar and

Churchwardens of the parish for the time being, to nominate such number of Scholars, to be taken out of the said Free Grammar School, as would supply the vacancies, and present them to the Master, Fellows and Scholars of *St. John's College* aforesaid, in like manner as the Master, Wardens and Brethren of the Fraternity or Guild might have done before the dissolution thereof, and that the Scholars so to be presented, should be received into the College, and have the like exhibition within the same, as any Scholars of the School, nominated by the Master and Wardens of the Guild, ought to have had, according to the before-stated Deed; and that, if the Master and Fellows, when the Schoolmaster's place should be void, should, for two months, omit to appoint a proper Schoolmaster, and, if the Schoolmaster and Churchwardens should omit to appoint an Usher, for two months after avoidance, then it should be lawful for The Archbishop of *York*, and his Successors, to appoint a Schoolmaster and Usher.

The Information then stated that, by a Deed of Feoffment, dated the 9th of January, in the Fifth Year of Queen Mary, *Thomas Dowman* in pursuance of the Act of Parliament, granted and confirmed, unto the then Master and Usher of the School and their Successors, the said Lands and Hereditaments of which he was so seised as aforesaid, In Trust for the maintenance and support of the School: That the School was endowed with divers other Estates, the particulars of which the Relators were unacquainted with: That, at the date of the Deed of the 1st of December, 17th Hen. 8th, the Lands and Premises thereby conveyed to *St. John's College*, were no more than sufficient for the maintenance of the Five Scholars, but had, since, greatly increased in value, and, for many years past, had

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amounted to 600*l.* per annum, the whole of which the College had applied for their own benefit, except as therein mentioned: That the Rents of the Estates with which the School was endowed, had, for some time past amounted to 1,020 *l.* per Annum, and that the Master of the School had received the whole thereof, and had thereout, paid the sum of 250 *l.* to the Usher, and applied the residue to his own use: *That it was the duty of the Master and Fellows of St. John's, to visit the School, and to take care that the same was duly kept up, and to see that the Master was competent and attentive to his Duty, and, if the Master and Fellows had not neglected so to do, the School would have been duly maintained and a sufficient number of Scholars educated thereat, to fill the Scholarships; but that, for many years prior to 1818, no Scholars whatever were educated at the School, and the School-house had been permitted to fall into decay: That, although it was the duty of the Master and Fellows to give notice of the Scholarships being vacant, and to require that the same should be duly filled up, yet that they had not, at any time, given any such notice, or in any manner been desirous of keeping the Scholarships duly and regularly filled up, and that, by reason of the neglect of the Master and Fellows, no Scholars had been, for many years present from the School to the College, except in a few instances, and then inadequate allowances were made to them: That, by reason of the aforesaid neglect of the Master and Fellows of the College, and their refusal to make any greater allowance to Scholars elected from the School, many persons had been discouraged from sending their Sons to the School, which had, in consequence thereof, been reduced to a very small number of Boys: That the before-mentioned abuses of the Charity had been long known to the College, but that*

be applied to the maintenance and support of
s elected from the School, and that it was not
ntion of *John Dowman*, nor was it the true
tion of the Deed of the 17th Hen. 8th, that
s from the School should be entitled to such
ents only as the Scholars on the original Foun-
of the College were entitled to; and that the
struction and effect of the Deed, ought to be
ned by the Court, and the Charity, or such
reof as related to the Scholarships, ought to be
hed according to such true construction: That
luments enjoyed by the Scholars on the original
tion of the College, were greater than those
l been allowed to the Scholars from the School:
e Master and Usher of the School had (as the
knew) neglected their Duties, and the Master
th their approbation, received and applied to his
e, the whole of the Rents of the Estates with
he School was endowed, except what he had
an Assistant: That such Rents were much
an a competent Salary to the Master, even if
ties were performed, and the same were not
d to be all applied for the personal benefit of the
and Usher, but were given for the support and
ance of the School, and ought to be applied
benefit thereof, according to a Scheme to be
by the Court; and that the Charity ought, in
ects, to be established, and proper directions

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the Estates were conveyed by the several Deeds and Instruments before set forth, might be ascertained and declared by the Court, and, in particular, that it might be declared that all the Estates held by the College under the Deed of the 17th Hen. 6th, might be declared to be held by them for the endowment of Scholarships to be filled up by Scholars from the School; that it might be referred to one of the Masters of the Court, to settle a Scheme for the application of such Rents in the augmentation of the present Scholarships and the endowment of future Scholarships, if necessary; and that it might be also declared that all the other Estates were held for the general benefit and support of the School, and that the Annual Income thereof ought to be applied for that purpose, according to a Scheme to be settled by the Court: and that it might be referred to one of the Masters of the Court, to settle a Scheme for the application of such last-mentioned Rents, and that, in settling the same, competent Salaries might be allowed to the Master and Usher, and made dependent on their personal attention to the School; and that the Residue might be applied in such a manner as would be most conducive to the benefit of the School.

The Master, Fellows and Scholars of *St. John's College*, filed a Demurrer for Multifariousness, and demurred, *ore tenus*, because The Archbishop of York was not a Party.

Mr. Knight, Mr. Jacob and Mr. Wilbraham, in support of the Demurrers:

The Information relates to separate Estates, which are vested in two distinct sets of Trustees, upon different Trusts, and it seeks Relief in respect of Breaches of Trust which are wholly distinct from each

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There may have been a Breach of Trust with
to the College Estates, but not with respect to
ool Estates. Suppose there had been Scholar-
i four or five different Colleges, and all those
s had been made Parties, would not the Informa-
re been Multifarious? Each Body ought to be
i respect of its own Breach of Trust. The
s of Trust alleged as to the School Estates,
, have been made the subject of one Informa-
l the Breaches of Trust as to the College Estates,
, have been made the subject of another. The
hips were founded by *Dowman* alone; but the
was endowed by other Benefactors as well as
i. The Scholarships may be regulated without
ig with the School, and the School may be
l without interfering with the Scholarships.
ators, indeed, do not pretend that what they
be done by one Scheme; for they pray that
ay be one Scheme for the College Estates, and
for the School Estates. *Marcos v. Pebrer (a)*.
v. Hyde (b).

dly: The Archbishop of *York* ought to have
le a Party.

y: The Master and Usher of the School, are
t as a Corporation, but as individuals. The
ion does not ask that they may answer under
nmon Seal; and the Subpcena is prayed against
their names.

W. Horne and *Mr. Bethell*, in support of the
formation:

hool and the Scholarships were founded by the
under: the Scholarships were founded for the

e, Vol. III. page 466. (b) *Jacob's Rep.* 151.

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benefit of the School: and the College is connected with the School by the Deed under which it takes the benefice given to it.—[The Vice-Chancellor: What has the College to do with the School, beyond appointing the Master?—It has a duty to perform in superintending the Master. The Scholarships are an integral part of the same Charity as the School.—[The Vice-Chancellor: Are the Master and Fellows of the College the Visitors of the School?—By the Act of Parliament, the power of appointing the Schoolmaster, is given to the Master and Fellows; and, by the Deed of the 17th Hen. 6, the Master, or a Fellow of the College sent by him, is directed to inquire into the qualifications and conduct of the Master of the School, and to dismiss him if he is found unfit for his office or negligent of his duties: and the Information contains an express charge that it is the duty of the Master and Fellows to visit the School, and see that it is duly kept up, and that the Master is competent and attentive to his duty.]

The Prayer of the Information has been much objected upon: the Allegations, however, are the material part, and the Court will give relief applicable to those Allegations, without regard to the Prayer. A great deal of the doctrine respecting Multifariousness, is inapplicable to Charity Informations. If the Information had related to the School only, the College would have been necessary Parties; and, if it had related to the Scholarships only, the Master and Usher would have been necessary Parties. How is the Court to establish the School without interfering as to the Scholarships? There is a distinct allegation that the School, to establish which is the object of the Information, has been prejudiced by the neglect of the Master and Fellows to give notice of the Vacancies in the Scholarships and to require them

Archbishop of York is not a necessary Party: not interested in the regulation of the Charity, is merely a contingent right to nominate the of the School.—[The *Vice-Chancellor*: The Bishop of York ought to have been made a Party.]

Mr. Knight, in reply:

There connexion of two subjects, does not give to join them in one Information: if some of the have no interest in one of the subjects, they not be united in the same Suit. The Information ended on a misconstruction of the Instruments in it. The School and the Scholarships are dis- foundations. The College holds certain Estates, in addition of receiving, as Scholars, five Boys edu- at the School, and who are to be nominated by master of the School and the Vicar and Church- of the Parish. The effect of the Deed of the 15th. 8., was to purchase, from the College, the of nominating, to Scholarships in the College, five bursars who had been educated at the School. This is the connexion between the School and the College: upon this ground, the Information calls upon the to account for all the Rents of the Estates which are paid upon that condition, and to disclose in what way they deal with their Scholars in general. When the bursars are sent to College, all their connexion with

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THE VICE-CHANCELLOR:

My present impression is that this Information is Multifarious.

The Grant to the College on condition of maintaining the five Individuals who were to be sent from *Peckington School*, was quite separate from the original Endowment of the School. That Grant created a Charity for five Individuals, who were not to derive any benefit from it until they had quitted the School. The administration of that Charity, is a totally different subject from the management of the School at large.

The question raised, by this Information, with respect to the Estates given to the College, is not what benefit the School at large ought to derive from those Estates but what benefit five Individuals, who have ceased to have any connexion with the School, ought to derive from them. The School and the Scholarships are, in their origin, distinct Foundations.

The question whether this Information does, in reality, embrace one object only, resolves itself into this, namely, can one Defence be made to the whole of it? Now it cannot, I think, be said that any Defence that the College can make to that part of the Information which relates to the administration of the School, will apply to that part of it which has for its object to obtain an increased Allowance for the five Scholars.

My present Opinion, therefore, is, that the objection for Multifariousness is well founded: but, before I finally decide, I will read through the Information.

CASES IN CHANCERY.

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The VICE-CHANCELLOR:

I have read over the Information, and I see no reason to alter the Opinion that I expressed when the Demurrer was argued, namely, that the Charities as to the School and as to the Scholars to be sent to the College, are distinct from each other; and, therefore, the Demurrer for Multifariousness, as well as the Demurrer for want of Parties, must be allowed. There may, indeed, be a question whether, at the time when the Scholars are elected, they need belong to the School.

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21st January.

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CHUTE v. ROSS.

THE Decree directed the Plaintiff to pay the Costs of *Burney*, a Co-defendant, and those Costs to be repaid to the Plaintiff by the Defendant *Ross*, and *Ross* to pay the Plaintiff his Costs.

1835:
22d January.

Practice.
Costs.

The Costs of the Suit were taxed; and the Plaintiff took out two Subpœnas, one for the Costs which he had paid to *Burney*, and another, for his own Costs. In consequence of *Ross* not having paid the Costs, the Plaintiff took out one Attachment for the whole Amount of them, but *Ross* was charged for one Subpœna only.

Where a Decree directs the Plaintiff to pay the Costs of one of the Defendants, and to have them over again from another Defendant, and that Defendant to pay the Plaintiff's Costs; the Plaintiff is not at liberty to issue more than one Subpœna or more than one Attachment for both sets of Costs. *Semble.*

Mr. *Wakefield*, for *Ross*, moved to discharge the Attachment, for irregularity, which, as he contended, consisted in taking out two Subpœnas: and he produced a Certificate, sent to Lord *Lyndhurst*, when C. B., by the Clerks in Court of this Court, in which the Costs of the Suit having been decreed to be paid as above, the

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Plaintiff took out a separate Subpoena and a separate Attachment for each set of Costs: and the Clerks in Court certified that the whole of the ought to have been included in one Attachment.

Mr. *Jemmett* appeared for the Plaintiff.

The *Vice-Chancellor* said that the Plaintiff had proposed no additional Expense on *Ross*, by taking the two Subpoenas, and refused the Motion with

1835:

22d January.

Practice.
New Orders.

Under the 17th Order of 1831, a Plaintiff, though he does not want a Commission, is not at liberty to give a Rule to pass Publication until the expiration of three weeks from the service of the Subpoena to rejoin.

FLIGHT v. JONES.

ON the 26th of May 1834, the Plaintiff filed a motion, and, on the same day, served a Subpoena to rejoin. On the 5th of June, he gave a Rule to Publication, which expired on the 12th of that month, being the last day of Trinity Term.

Mr. *Wakefield*, for the Defendant, moved to discharge the Rule to pass Publication, for irregularity, on the ground that, under the 17th Order of 1831, the Plaintiff was not at liberty to give the Rule, until the expiration of three weeks from the service of the Subpoena to rejoin.

Mr. *K. Parker*, for the Plaintiff, opposed the motion on the ground that the Plaintiff, by giving the Rule, showed that he did not intend to sue out a Commission.

The *Vice-Chancellor* discharged the Rule with

RICHARDS v. THE EARL OF MACCLES-
FIELD.

1835:
30th January.

*Advowson.
Right of Pre-
sentation.
Coparceners.*

THIS was a Suit, for Specific Performance, by the Vendors against the Purchaser of the next Presentation to the Vicarage of *Chew Magna*, with the Chapelry of *Dundrey* annexed, in *Somersetshire*. The *Master* having reported in favour of the Title, the Defendant excepted to his Report. The Exception now came on to be argued.

An Advowson descended to four Coparceners, *A.*, *B.*, *C.* and *D.*, who agreed to present in succession, according to their seniority. When the third Turn came, *C.* had died, leaving two Co-heirs, *E.* and *F.*, between whom the Right to present was disputed. *F.* however presented, and, on the next avoidance, *E.* presented. Held that the Presentations by *E.* and *F.* were to be counted, though they were usurpations on the Rights of *F.* and *D.* respectively, and that, on the seventh Avoidance, *F.* would be again entitled to present.

It appeared that, in 1622, one *Roberts*, being seised in fee of the Advowson of the Vicarage, (which was an Advowson in gross) died intestate, and that it descended to his four Daughters and Co-heirs, *Mary*, *Jane*, *Prudence* (under whom the Vendors claimed) and *Grace*. On the happening of the first avoidance after the Intestate's death, his Daughters did not agree, among themselves, to present, jointly, to the Vicarage, and, therefore, *Mary*, the eldest Daughter, became entitled to present to it, for that turn: and, on the happening of the subsequent avoidances, the other Daughters became entitled to present to it, successively, according to their seniority. Consequently, *Prudence*, the third Daughter, or those claiming under her, would be entitled to the third, seventh and eleventh turns. On the happening of the first six Vacancies, the Presentations were regularly made. When the seventh Vacancy occurred, *Prudence* had died leaving two Daughters, her Co-heirs, of whom *Frances* was the elder and *Prudence* the younger; and the right of presenting on that occasion, was claimed by *Silvanus Bond*, as being entitled under *Frances*, and

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by *Thomas Gibbon*, as being entitled under *Prudence* the younger. *Bond* and *Gibbon* not being able to agree, between themselves, as to the right to the Presentation, the former brought a *Quare Impedit* against the latter*; pending which, *Gibbon* presented on *Rogers* to the Vicarage. Not long afterwards, *Rogers* died Incumbent of the Living. If the Presentation of *Rogers* was not void, but was to be counted, his death caused the eighth avoidance after the death of the Intestate, and, consequently, the Presentation for the turn, belonged to his fourth Daughter, *Grace*, or to those who claimed under her. *Bond*, however, presented *W. Smith* to the Living; and, on *Smith's* death, Persons who claimed under *Grace*, presented *Robert Pyke*. On *Pyke's* death, the turn to present was disputed by the Parties claiming under *Mary*, the Intestate's eldest Daughter, on the one hand, and by Parties claiming under *Jane*, the second daughter, on the other; and thence arose the *Quare Impedit*, between *Pyke* and The Bishop of *Bath and Wells* and *Lindsey*, in which Judgment was given for the Defendant.

The right to present when the Living should again become vacant, was claimed by the Vendors, as representing *Prudence* the younger, and was the subject of the Contract between the Parties to this Suit.

Mr. *Jacob* and Mr. *Chandless*, in support of the Exception:

The Case of *Pyke v. The Bishop of Bath & Wells* seems to have been decided on a defect in the Pleadings

* The only Account that could be found of the above Claim and the Proceedings under it, is in the Report of *Pyke v. Bishop of Bath & Wells & Lindsey*, in Bacon's Ab. Title Joint-tenants (H.) See Vol. 4, page 482, 7th Edition.

It does not appear that any Judgment was entered up in that Case; and, unless it was, the Court would not issue the Writ to the Bishop. Besides, the Judgment, if it was entered up, could not affect third Parties.

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The question is whether the turn that is now coming, is the 10th or the 11th turn. How is the Court to know that it is the 11th? The Case of *Pyke v. The Bishop of Bath & Wells* (supposing it to be rightly decided) does not amount to a Decision that the Presentation by *Gibbon* is to be reckoned; and, if it is not to be reckoned, the next turn will be the 10th; and, even if it should be the 11th, there may be a question whether, as the Parties who claimed under *Prudence* the younger, had the seventh turn, the Vendors, who now claim under her, are to have the 11th; or whether it does not belong to the Representatives of *Silvanus Bond*. If there is a doubt, the Court will not compel the Purchaser to take the Title.

Mr. Coote, Mr. G. Richards, Mr. Keene and Mr. Bagshawe, in support of the Report:

We contend that the next turn is the 11th, and that those who claim under *Prudence* the younger, are entitled to it. It is not necessary for us to show that the prior Presentations were rightfully made. *Gully v. The Bishop of Exeter* (b). Although *Gibbon* usurped the right of *Bond*, and *Bond* usurped the right of *Grace*, their Presentations must be counted. *Bond*, if he had the right, lost it; and, on the next avoidance, the turn will come round again to those who represent *Prudence* the younger; for usurpation does not disturb the turn,

(b) 10 Barn. & Cress. 584.

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or, in other words, does not deprive the Copar
her right to present, when her turn again comes

The VICE-CHANCELLOR :

I am of opinion that the Title is good.

It is evident that *Silvanus Bond* and *Thomas* who represented, respectively, the elder and the Daughter of *Prudence*, who was the Intestate Daughter, did not agree as to the mode of Presentation on the happening of the third avoidance, and Presentation by *Gibbon* on that occasion, was a violation of the right of *Bond*. When the Livor became void, *Bond* presented, and, thereby, usurped the right of *Grace*, the Intestate's fourth Daughter, those who claimed under her. These two Presentations had, however, the effect of supplying the avoidance which they were made. The Cycle, then recomenced, for it seems to have been decided, by the Court of Common Pleas in the Case cited from Bacon's Reports, that the turn which was then in dispute, was the 10th turn. The consequence is that the next turn is the 11th turn; and I cannot but think that it is right to give the turn to those who represent the younger of the two Daughters of which *Prudence*, the Intestate's third Daughter, is the root. The Exception, therefore, must be refused.

WALDO v. WALDO *.

1835 :
30th January.

JANE MEDLEY, by her Will dated the 8th of June 1827, devised the Manor of *Heaver*, in *Kent*, and other Real Estates, unto and to the use of *Spencer Newcomb Meredith* and his Heirs, upon Trust to settle the same to the use of *Jane Waldo* and her Assigns, during her life (but she not to have any power of cutting down more Timber than was merely necessary for repairs), with Remainder to Trustees to preserve Contingent Remainders, with Remainder to the use of *Edward Wakefield Mead*, Esq. during his life, without impeachment of Waste, with Remainder to Trustees to preserve &c., with Remainder to the use of the first and other Sons of *Edward Wakefield Mead* in Tail, with Remainders over.

Timber.
Tenant for Life.

Testatrix devised an Estate to a Trustee in Trust to settle it on *A.* for life, with power to cut Timber for Repairs only, Remainder to *B.* for life *sans Waste*, Remainder to his first and other Sons in Tail. The Trustee, under a Surveyor's advice, and with the consent of the Tenants for Life, ordered Timber on the Estate to be felled, and invested the Proceeds in the purchase of Stock in his own Name. Held that *A.* was entitled to the Dividends of the Stock for her life.

The Testatrix died in December 1829; and, shortly afterwards, before the Settlement directed by the Will had been made, a considerable quantity of Timber on the Estates was cut and sold under the circumstances after mentioned, and the proceeds were invested in the purchase of Stock, in *Meredith's* name. The Bill was filed by *Edward Wakefield Mead* (who had taken the name of *Waldo*) against *Jane Waldo*, the Plaintiff's eldest Son, who was an Infant, and the Trustee, for the purpose of having the Rights and Interests, of the Parties, in the Stock, ascertained and declared.

The Cause now came on for further Directions.

* *Ex Relatione.*

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It appeared, from the *Master's* Report made in pursuance of the Decree, that a Surveyor employed by *Meredith* with the concurrence of the Plaintiff and the Defendant, Mrs. *Waldo*, had reported that there was a considerable quantity of Timber on the Estates, which had arrived at maturity, and ought to be cut down, and it would not improve, but, on the contrary, many of the Trees would decrease in value, if allowed to stand having already shown symptoms of decay, and that some of such Timber was absolutely required to be cut with a due regard to the growth of the surrounding Trees: that *Meredith*, thereupon, consulted with the Plaintiff and the Defendant Mrs. *Waldo*, and, with the consent, ordered the Trees which the Surveyor had marked, to be cut down and sold, but that there remained standing on the Estates much more than sufficient for any future Repairs.

It was contended by Mr. *Knight* for the Plaintiff, and by Mr. *Tennant* for the Infant Defendant, that, before the Timber was cut, an Application ought (as in the case of *Tooker v. Annesley*)(a) to have been made to the Court for its sanction, and that, as it had been done without any competent authority, the Tenant for Life ought not to receive any benefit from it.

Mr. *Jacob* and Mr. *Gresley* appeared for the Defendant Mrs. *Waldo*.

The *Vice-Chancellor* said that he considered the Timber to have been cut by the authority of the Trustee who had a superintending control over the Estate; that it was not a wrongful act; and that the effect of it must

(a) *Ante* vol. 5, page 235.

be the same as if it had been done with the sanction of the Court.

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His *Honor*, therefore, ordered, as in the case of *Tooker v. Annesley*, that the Tenant for Life should have the Dividends of the Stock during her life, and that all Parties should be at liberty to apply at her death.

GAMBIER v. GAMBIER.

1835:
18th February.

IN 1818 the late Earl of *Athlone* in *Ireland* and Count *de Reede* in *Holland*, married, at *Paris*, Miss *Hope*, who was possessed of large Personal Property. The Earl was domiciled in *Holland*. Miss *Hope* was born at *Amsterdam*, of *English* parents, and, at the time of her Marriage, declared her domicile to be at the *Hague*.

Domicile.
Personal Property.
International Law.

By the Law of *Holland*, the surviving Parent is entitled to the Income of the Children's Property, until they attain 18.

By the *Code Napoleon*, which is the Law of *Holland* as well as of *France*, the Parties to a Marriage, unless the Contract contains an express stipulation to the contrary, marry with community of Property, and, in that case, the Husband and Wife enjoy, during their Marriage, the whole of the Property belonging to each of them, and, in the event of the Marriage being dissolved, either by legal separation or by death, the Joint Property is divided between them or their Representatives, as the case may be, in Moieties. If, however, it is stated, in the Contract, that the Parties marry without

By a judicial Compromise of a Suit in *Holland*, two Infant Children, who were domiciled in this Country, were adjudged to be entitled to One Fourth of their deceased Mother's Personal Estate.

Held that their Father was not entitled to the Income of their Property until they attained 18.

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community of Property, then they retain the same rights to Property possessed at the time of the Marriage or acquired after it, as they would have had if they had remained single.

Previously to the Marriage of the Earl of Athlone with Miss *Hope*, they executed a Contract, in the *Dutch* Language, in which it was provided that the Marriage should be without community of Property; but the Contract was not passed before a Notary, according to the Forms prescribed, by the Law of *Holland*, to make it valid.

The Earl died in 1823, leaving his Wife, and a Son and two Daughters, one of whom afterwards died, him surviving. In 1825 the Countess married the Defendant *William Gambier*, who was a *British* subject. Previous to the Marriage, a Contract dated the 16th of April 1825, was drawn up at the *Hague*, in the *Dutch* Language, and passed before a Notary, according to the Forms above-mentioned, in which community of Property was excluded; and it was, among other things, declared that, in case the intended Wife should happen to die first, whether with or without having a Child, Children or other Descendants, the intended Husband should, in such event, provided the Marriage still continued to exist, obtain One Fourth Part of the net Property by her left, as the same might be found at her death, under and subject to this condition, that such One Fourth should be, exclusively, borne by the Hereditary Portions of the Children who might be born of that Marriage, should the same be two or more in number, the Wife, in that case, giving to her Husband such Right and Disposition thereof as the *English Laws* might allow in that respect.

There was Issue of this Marriage a Daughter and a Son, both of whom were born in *London*, the Daughter in 1826, and the Son in 1827.

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In 1829 a Suit was instituted, in the *Dutch Courts*, by *William Frederick Count Van Reede*, as the Guardian, by the Laws of *Holland*, of the Children of the first Marriage, against the Defendant *Mr. Gambier*, (who then was, and, for some years before, had been resident, with his Wife, in *England*) for the purpose of ascertaining the legal Rights of the Children of the first Marriage; the Count contending that the Contract entered into on the first Marriage, was void, and, therefore, that there was a community of Property between the Earl and Countess, and that, at the Earl's death, his Children became entitled, independently of the Countess, to a Moiety of her Property, in right of their Father, and that they would also be entitled to a Share in the Moiety belonging to the Countess. *Mr. Gambier* pleaded that the *Dutch Courts* had no jurisdiction over the subject-matter of the Suit, inasmuch as the late Earl and the Countess and their Children were *English*. In 1830, whilst these Proceedings were pending, the Countess died in *England*, where she and *Mr. Gambier* and their Children were domiciled. After her death, the Proceedings were continued; and *Mr. Gambier* contended that, by his Wife's death, he had become entitled to all her Property, which was chiefly in the *English Funds*, and which, at the time of the second Marriage, was transferred into and still remained in the Names of two Trustees (who were *Dutchmen* domiciled in *Holland*) and of the Countess.

Afterwards, a judicial Compromise was made of the Matter in dispute; and, on the 24th of February 1831,

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an Instrument, by which all Parties were irrevocably bound, was drawn up at the *Hague*, in the *Dutch* Language, and, thereby, Mr. *Gambier* withdrew his Plea to the Jurisdiction, and disclaimed all right acquired, by the Laws of *England*, to his late Wife's Property, either as her Husband or by virtue of the Letters of Administration to her Estate which had been granted to him by the Archbishop of *Canterbury*; and it was declared that the Contract entered into on the first Marriage, should remain, in every respect, perfect and entire, and that, in conformity thereto and to the Contract entered into on the second Marriage, partition should be made of every thing which the Countess had left, in such a manner that thereof one Moiety should be allotted to her Children by the first Marriage, and the other Moiety, to Mr. *Gambier*, as well for himself as for his Children, who were to share in the same, each for One Half, so that Mr. *Gambier* was to have One Fourth and his Children the other Fourth. In pursuance of this Instrument, one Moiety of the Countess's Stock in the *English* Funds, was transferred into Mr. *Gambier's* Name.

By the 384th Article of the *Code Napoleon*, the Father, if the surviving Parent, has the enjoyment of the Property of his Children until they attain the age of 18 years: And, by Articles 1367 and 1368, it is provided that the Parents themselves, cannot, by any special Conventions, derogate from the right which is conferred, upon the Survivor of such Parents, by Article 384.

Mr. *Gambier* having insisted that, as the Instrument of Compromise was made in *Holland*, all Parties taking Property under it, must take subject to the Law

Country, and, therefore, that he was entitled to the Income of his Children's Share of their late Property until they attained 18, the Bill was for his Children, who were born in *England*, always resided there, insisting that, by the Instrument of Compromise, One Half of the Stock which was transferred into the Defendant's Name, absolutely, the Property of the Plaintiffs, and that, by the Law of *Holland* might be, the Defendant entitled to the Dividends of that Moiety until the Plaintiffs attained 18; and it prayed for a Declaratory effect.

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W. Horne and *Mr. G. Richards*, for the Plaintiffs :

intend that the *Dutch* Law regulated the acquisition of the Shares of *Lady Athlone's* Property to *Mr. Gambier* and his Children have become entitled that, when those Shares were acquired, they were the Property of *British* subjects, and, therefore the *Dutch* Law became *functus officio*, and was superseded by the Law of *England*.

Contract made on the second Marriage, and on the Instrument of Compromise was engrafted, an express Stipulation that, with respect to One Fourth of the Countess's Property which *Mr. Gambier* was to take on the Countess's death, he was to have such Right and Disposition thereof as the Laws might allow. Therefore, there was an Stipulation that, after the Property had been acquired, the enjoyment of it should be regulated by the Law: and, if the Father takes as a *British* subject the Children must take in the same character :
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and, consequently, the Father can have no Rights what the *English* Law gives him.

Supposing, however, that there had been no Stipulation in the Marriage Contract, the claim set by the Defendant, could not prevail; for the Children of the second Marriage, as well as their Parents, were domiciled in *England*; and, therefore, as soon as an Instrument of Compromise was executed, the Law of *England* applied to the Property taken under it. *M v. The Duke de Fitzjames* (a), *De la Vega v. Villanueva*, *Sawyer v. Shute* (c), *Campbell v. French* (d).

Mr. Knight and Mr. Short, for the Defendant Gambier:

Our Case is that, according to the true construction of the Instruments, the Shares of the Children of the second Marriage in their late Mother's Property, never come to them for the purpose of enjoyment. Lady *Athlone* was domiciled in *Holland* at the time of her second Marriage. The Settlement made on that occasion, was *Dutch* both in Form and Language, and the Trustees were *Dutchmen*. When you have to construe an Instrument conferring Property, you must construe it according to the Law of the Country in which it is made. The Marriage Contract left the Rights of the Children to be regulated by the Law of *Holland*, which gives, to the Father, the Right to the enjoyment of his Children's Property until they are 18, and expressly provides that the Parents shall, by any special Conventions, derogate from that Right.

(a) 1 Bos. & Pull. 138. See 142.

(b) 1 Barn. & Adol. 284.

(c) 1 Ans. 63.

(d) 3 Ves. 321.

: Property to them, except *sub modo*. It would
 : to apply the *English* Law to the Compromise;
 : Advocates of the different Parties, who arranged
 : ns of it, could not have had in view any thing
 : Law of *Holland*: and Mr. *Gambier*, in his
 , says that the Advocate employed by him, did
 rt, in the Instrument of Compromise, a special
 ion or Stipulation to the effect of the 384th
 of the *Code Napoleon*, because he assumed, and
 r assumed that it was unnecessary, inasmuch
 Plaintiffs, taking the Benefit of the Concession
 n their behalf, under the Compromise, must take
 ct to the *Dutch* Law. By the Law of this
 ; Mr. *Gambier* would have taken the whole of
Malone's Property. What the Children acquired,
 quired by the Law of *Holland*: can they then
 what they so acquired is to be regulated by
 r of *England*, when, by the Law of *England*,
 ther would have taken the whole? The Lan-
 und effect of a foreign Contract, cannot be
 by the Domicile of the Parties.

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ights of the Plaintiffs are not derived under
 ement made upon their Mother's Marriage with
 mbier ; but under the judicial Compromise, which
 nsider as a judicial Decree which adjudicated

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By the *Code Napoleon*, which is the Law of *Holland*, as well as of *France*, when Children are under the age of 18. their surviving Parent has the enjoyment of their Property until they attain that age. But that is nothing more than a mere local right, given to the surviving Parent, by the Law of a particular Country, so long as the Children remain subject to that Law: and, as soon as the Children are in a Country where that Law is not in force, their Rights must be determined by the Law of the Country where they happen to be. These Children were never subject to the Law of *Holland*: they were both born in this Country, and have resided there ever since. The consequence is that this judicial Decree has adjudged certain Property to belong to two *British*-born subjects domiciled in this Country; and so long as they are domiciled in this Country, their Personal Property must be administered according to the Law of this Country. The claim of their Father does not arise by virtue of the Contract, but, solely, by the local Law of the Country where he was residing at the time of his Marriage; and, therefore, this Property must be considered just as if it had been an *English* Legacy given to the Children: and all that the Father is entitled to, is the usual reference to the *Master* to inquire what Allowance ought to be made to him for the past and future Maintenance of his Children.

RANDALL v. RANDALL.

1835 :
26th and 27th
January,
and 12th May.

Partnership.
Conversion.

1792, *Richard Randall, William Randall, James Randall and Elizabeth Randall*, upon the death of their father, became entitled, as Tenants in Common, to an estate, partly Freehold and partly Leasehold, consisting of a Dwelling-house, Farm-yard, Barn, Stable, Garden, and Lands, in the Parish of *Romsey Extra*, in *Hampshire*.

Richard Randall was a Land-surveyor, and *William Randall*, a Grocer; and the former had a separate Property in the Parish. *Richard* and *William Randall*, shortly after their Father's death, agreed to become Co-partners, in equal Shares, in the Business of Farming, including the growing of Hops; and, in 1794, entered into Partnership together, in like Shares, in the Business of making Malt. Not long afterwards, they entered into a joint-contract, with the Commissioners of the Navy, for supplying the Navy with Biscuit, and commenced the manufacture of Biscuit in Partnership together. The Farming and Malting Businesses were carried on upon the family Estate; and the manufacture of Biscuit, partly on the family Estate and partly on *Richard Randall's* separate Property. In 1802, *Richard* and *William Randall* purchased, of *James Randall*, his One Fourth of the family Estate, for 280*l.*, the Purchase-money was paid or satisfied out of the Lands or other Property of the Partnership: but no

A. and B., Tenants in common of an Estate, agreed to carry on the Farming business in Co-partnership, and afterwards entered into Co-partnership as Maltsters and Biscuit-bakers. From time to time, they made purchases of Land with the Partnership-moneys. Some of the Lands so purchased were not conveyed to them, but others were conveyed, as to one Moiety, to *A.*, who was a Bachelor, in fee, and, as to the other Moiety, to *B.* who was

married, and a Trustee, to bar Dower. The Lands were used, solely, for Farming and Agricultural purposes, but all the Receipts and Payments in respect of them, were entered in the Partnership-books and carried to the Account of the Partnership. The Farming business was continued until *A.'s* death, but the Malting and Biscuit-baking had ceased several years before. Held that the Lands were not converted into Personalty.

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Conveyance of the Share so purchased was executed to them. In 1803 they purchased, of Miss Long, some pieces of Land, containing 17 a. 1 r. 25 p., in *Romsey Extra*. The price was paid out of the Partnership Funds, but no Conveyance was executed to them; and the Land was used by them for farming and agricultural purposes. In 1805 they purchased, of *Joseph Tarver*, 19 Acres of Land, in *Romsey Extra*, one Moiety of which was conveyed to *Richard Randall* (who was single), in Fee, and the other Moiety, to *William Randall* (who was married), and a Trustee for him, to the usual Uses to bar Dower. This Land also was paid for out of the Partnership Funds, and was used by the Purchasers for farming and agricultural purposes. In 1806, in pursuance of an Act of Parliament for inclosing Lands in *Romsey Extra*, certain Allotments containing 27 a. 3 r. 26 p., were made to *Richard* and *William Randall*, generally, in respect of their Freehold and Leasehold Lands in the Parish. The expences of fencing, embanking, cultivating and improving these Allotments were paid out of the Funds of the Partnership; and the Allotments were used, by the Brothers, for farming and agricultural purposes. In 1820, two Messuages and Gardens, in *Portsea*, were purchased by them, with the Partnership Monies, of one *Reeves*, and were conveyed in the same manner as the Lands purchased from *Tarver*. These Messuages and Gardens were let to Tenants: and the Rents, and all other Receipts and Payments in respect of the rest of the Estates, were regularly entered, by *Richard* and *William Randall*, in the Books of the Partnership, and were carried to the Account thereof; because, as the Answer alleged, *Richard* and *William Randall* were Tenants in Common of those Estates, and, therefore, it was not thought necessary by them, to open any separate or distinct Account of such Receipts

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vements. The Malting Business was discontinued 1827; but the Partnership in the Farming Business continued until August 1827, when *Richard Randall* died intestate as to his Real Estates, leaving his son, *William*, his Heir-at-law, and having, by his Will, which was not duly attested, given the residue of his Real Estate to the Plaintiff, who took out Administration to him with the Will annexed. At *Richard Randall's* death, a Suit which he had instituted in December 1824, for taking the Partnership Accounts, (which had never been settled) was pending. After his death the matters in difference were referred, by the Plaintiff and the Defendant, to Arbitrators, who afterwards made their Award, but which did not relate to the premises purchased and allotted as before-men-

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Bill prayed that it might be declared that one equal Moiety of the Estates which had been purchased by *Richard* and *William Randall*, formed part of the Personal Estate of *Richard Randall*, and that the Defendant, *William Randall*, might be declared to be a trustee, of such Moiety, for the Plaintiff, as the legal Representative of *Richard Randall*.

Answer stated that *Richard* and *William Randall*, during, from time to time, a large Surplus Capital employed and not wanted for the purposes of their Partnership, agreed to invest the same in occasional purchases of Land, which it was agreed should be paid out of such Surplus Capital, and conveyed to them

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that these Purchases were not, in any manner, required for the purposes of the Biscuit-baking and Malting concerns, nor were the same made otherwise than as a mode of employing Monies not then wanted, by the Co-partners, for the purposes of the Partnership or for the purposes of their respective separate Businesses: That the Lands so purchased and the Allotments made under the Inclosure Act, were used for farming and agricultural purposes only, and the Houses and Gardens bought of *Reeves*, were let to Tenants, and the Rents were received by the Defendant and *Richard Randall* as Tenants in Common and in no other character.

Mr. Knight and *Mr. K. Parker*, for the Plaintiff

The Estates were purchased out of the Partnership Funds. The Partnership Businesses were connected with the produce of Land, and the Sums received and paid in respect of the Estates, were entered in the Books of the Partnership; so that all the Partnership were blended together. The Law on this subject is settled by *Phillips v. Phillips (a)*, and *Broom v. Broom (b)*.

Sir William Horne and *Mr. Sandys*, for the Defendant:

The Defendant and his Brother, having succeeded to certain Real Estates which were their patrimonial Inheritance, began life by agreeing to occupy them in common. A joint occupation, by two Brothers, of the Paternal Estates, cannot, strictly speaking, be called Partnership. The Estates were Real Estates when they began to occupy them, and, from the manner in which the

(a) 1 Myl. & Keen, 649.

(b) 3 Myl. & Keen, 443.

dealt with those Estates, it is clear that they intended them to continue so. *Richard Randall* was a Surveyor, and *William Randall* was a Grocer; and each of them continued to follow his separate Trade. In 1794 they engaged in the Malting Business; which is a Business much connected with Farming, and, in some parts of the country, is incident to it. Having advanced a little in the world, they entered into a Contract for supplying the Navy with Biscuit. Though the Accounts between the two Brothers, never were balanced, yet, at certain periods, they laid out their Surplus Money (which is what the Bill terms their Surplus Capital) in the purchase of Land. They wished to realize and to make an addition to their paternal Estates; but they did not employ the Land so purchased, in Trade. The mode in which the Property so purchased was conveyed, is evidence of the intention of the Parties. If they had meant to convert it into Personalty, they would have taken a Conveyance to themselves, as Joint-tenants, in Fee: they, however, took a Conveyance, as to one Moiety, to *Richard Randall*, who was a Bachelor, in Fee, and, as to the other Moiety, to *William Randall*, who was married, and to a Trustee, to uses to bar Dower. Each of them, therefore, took a Share distinct from the other; and there can be no doubt that they intended to hold the Property, not as Partners, but in their separate and individual capacities, and that it should remain inheritable in each of them. The Malting Business ceased in 1802, and the Manufacture of Biscuit terminated with the War, in 1815.

In 1820, which was five Years after all the trading had ceased, they purchased Houses in *Portsea*, and had them conveyed in the same manner as before. They

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continued to occupy the Land as Tenants in Common, until 1827, when *Richard Randall* died.

The Doctrine of this Court, as to Real Estate being considered as Personal, is applicable to Trading Partnerships only. In *Phillips v. Phillips* the Testator was a Brewer at his death, and the Property as to which the question arose, consisted of Public-houses, which are an important part of a Brewer's Stock in Trade; they were purchased for the purposes of the Trade, and were conveyed to the Testator and his Partner, as Joint-tenants in Fee *.

12th May.

The VICE-CHANCELLOR :

The circumstances of this Case, which are very special, are as follows :

In the year 1792, *Richard Randall*, a Land Surveyor, *William Randall*, a Grocer, together with *James Randall* and *Elizabeth Randall*, became entitled, on the death of their Father, to a Freehold Estate consisting of a Dwelling-house, Garden and Lands, in the Parish of *Romsey Extra*, and, also, to certain Leasehold Estates in the same Parish, where *Richard Randall* had separate Property. *Richard* and *William*, shortly after their Father's death, commenced the Business of Farming and growing of Hops, which was a branch of the Farming Business. In 1794, they commenced the Business of making Malt; and, not long afterwards, they commenced the Business of Biscuit-baking, in con-

* The Report of *Broom v. Broom*, was not published when the above Case was argued, but was stated, by the Plaintiff's Counsel, from the Brief.

sequence of a Contract which they had made with the Commissioners of the Navy. At that time and during all the subsequent time, *Richard Randall* carried on his separate Business of a Land Surveyor, and *William Randall*, the Business of a Grocer. The Farming Business was carried on upon the family Estate, and the manufacture of Biscuit, partly on the family Estate and partly on *Richard Randall's* separate Property. [His Honor then detailed the particulars of the Purchases and Allotments of Land made by and to *Richard* and *William Randall*.] No Conveyance was executed of the Lands so purchased, except those purchased of *Tarver*, which were conveyed, as to one Moiety, to the use of *Richard Randall* in Fee, and, as to the other Moiety, to the use of *William Randall* and a Trustee, in the usual manner to bar Dower. All the Lands so purchased were paid for out of the Partnership Monies, and were used, solely, for farming and agricultural purposes. In 1820, *Richard* and *William Randall* purchased, with Partnership Monies, two Messuages and Gardens in *Portsea*, which were conveyed in the same manner as the Lands purchased from *Tarver*. This Property was not used for any Partnership purposes, but was let to Tenants. In or before 1815, all the Partnership Business in trade, had been given up; but the Farming Business was carried on, in Partnership, up to August 1827, when it was terminated by the death of *Richard Randall*. He died Intestate as to his Real Estates, leaving his Brother, *William*, his Heir at Law; and the Plaintiff took out Administration to him with his Will annexed. *Richard Randall*, before his death, filed a Bill against *William*, for an account of the Partnership dealings. After *Richard Randall's* death, the Plaintiff and the Defendant agreed to refer the matters in dispute to Arbitration.

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The Arbitrators decided on every point which was then considered to be a point in the Cause, but there was nothing in their Award which could be considered as concluding the present question; it having been taken for granted, throughout the Reference, that *Richard Randall's* Share of the Landed Property, had descended to his Brother *William*. The object of the present Bill is to obtain a Declaration that all the Property is Personal Estate.

Now, in *Thornton v. Dixon* (c), which was decided in 1791, *Joseph Dixon* and two other Persons, being seised in Fee of some Land, entered into Partnership, in 1761 as Paper-makers: and Mills were erected on the Land and they declared the Uses of the Land to themselves as Tenants in Common in Fee. In 1764 they took in four new Partners, and entered into a Covenant, in the Deed which was executed on that occasion, to stand seised of the Land in Trust for the Co-partnership, in the proportions in which they and their Co-partners were interested therein; and there was a Proviso in the Deed that, in case any of the Partners wished to dispose of their Shares, they might do so on giving Notice to the other Partners, in order that they might have an opportunity of purchasing. During the second Partnership the Partners bought a Freehold Messuage with a little Land adjoining, for the better carrying on the Trade which was enjoyed, by the Partners, as Joint Tenants. Other circumstances are then stated in the Report which raised the question whether the Real Estate was to be considered as retaining its original character, or as Personalty. On the first Hearing, The *Lord Chancellor* is reported to have said that he had always

understood that, where Partners bought Land for the purpose of the Partnership concern, it was to be considered as part of the Partnership Fund, and, consequently, that the Land in question must be considered as Personal Estate and distributable as such. The Cause was then suffered to stand over; and His Lordship gave liberty to argue the nature of the Property, if his proposition on that point could not be maintained. When it came on the second time, The Lord Chancellor thought that, had the Agreement been that the Mills should be valued and sold, it would have converted them into Personalty of the Partnership; but that the Agreement which had been entered into, was not sufficient to vary the nature of the Property: and, therefore, that, after the Dissolution, the Property would result according to its respective nature; the Real as Real, and the Personal as Personal Estate.—It is to be observed then, that though the Land was originally conveyed to the Partners as Partners and for the purpose of carrying on the Partnership Trade, yet The Lord Chancellor was of opinion that, after the Dissolution of the Partnership, it could not be considered as Personalty, but would resume its original character, or, in other words, that it could not be considered as Personalty except for the purposes of the Partnership.

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In *Ripley v. Waterworth* (d) (which came before the Court in 1802), *Mears*, the Testator, was seised in Fee of Three undivided Eighth parts of a Freehold Estate and Sugar Houses; and those Three Eighths, together with the remaining Five Eighth parts, were conveyed to the use of such persons as *Waterworth*, *Mears*, and *Margaret*

(d) 7 Ves. 425.

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Woods should appoint, and, in the mean time, as to *Mears's* Three Eighth parts, to his use, for the purpose of carrying on the Trade in Partnership with *Waterworth* and *Margaret Woods* or with such other persons as they should agree to admit as Partners; and, in default of such appointment, upon the decease of the shortest liver of the Three Co-partners, or upon the dissolution or cessation of the Partnership, to sell the Sugar Houses and Premises, and apply the Monies arising from the Sale (after paying off Incumbrances) in discharging such of the Joint Debts of the Partnership as the Joint Stock might fall short of paying, and to pay Three Eighth parts of the Residue, to *Mears*, his Executors, Administrators or Assigns, and the remaining Five Eighth parts, between the other two Partners: and the Deed contained a proviso that, in case there should be no appointment, then, upon the decease of the shortest liver of the three Co-partners, the two Survivors or either of them, might take their Share of the deceased Partner, as well of the Sugar Houses and Premises as of the Implements, Utensils and Fixtures, at certain Prices. No appointment was made by the three Partners; and, after the Testator's death, *Waterworth* gave notice that he elected to become the Purchaser of *Mears's* Three Eighth parts of the premises; which he purchased accordingly. The question which came on to be discussed before Lord *Eldon*, was what was the nature of the Testator's Interest in the Freehold Estate and Sugar Houses. His Lordship says: "I am strongly inclined to think this is Personal Estate; being of opinion that, upon the true construction of the Deed, the Parties had contracted with each other, that, when the Partnership should be determined, whether by the Act of the Parties or of God, the Property should be converted to all intents and purposes. There is an obvious difference from all the

Cases, which establish this general principle, that, where a person dealing upon his own Property only, has directed a conversion for a particular, special purpose, or out and out, but the produce to be applied to a particular purpose, when the purpose fails, the intention fails, and this Court regards him as not having directed the Conversion. But, first, this is a Case in which, not an individual gives directions, by Will or other Instrument, as to his individual Property, but three persons are contracting, with each other, as to what is to be done with Property of a very peculiar nature. By the Deed it is to be considered part of the Capital or Stock in Trade. The subject, I admit, is Real, but combined with a great number of Fixtures, Utensils and Implements, many of which are Personal. There being three Parties, it was rational that they should so engage, and that, when the Partnership should cease, the Property should, by mutual agreement, be disposed of as should be most beneficial to all of them. It was beneficial that the whole should be sold, out and out, at the end of the Concern, rather than that each individual Third-part should be brought to market." His Lordship afterwards says: "The question is, whether three Persons engaging in a purchase of Real Property such as this, and to be applied to such purposes, might not and did not contract that, if the Partnership should be dissolved by the act of all or the death of one, it should be all sold together, for the purpose of producing more benefit upon the Sale."

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It is remarkable that, on the same day as the Judgment was delivered in *Ripley v. Waterworth*, Sir W. Grant, M. R. decided the Case of *Bell v. Phyn(e)*.

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In that Case, three persons carrying on business as Merchants in London, joined, with another person, in the purchase of a Plantation in the Island of *Grenada*, two-thirds of which were to belong to the Partners, and the remaining third, to the other person. Part of the Purchase-money for the two-thirds, was paid out of the Funds of the Partnership, and the Partners severally covenanted to pay the remainder. The accounts relative to the Estate, were kept in the Partnership Book. Further payments were made, from time to time, out of the Partnership Funds, till the death of one of the Partners. The question that arose was similar to that in *Ripley v. Waterworth*: and Sir *W. Grant* said: "Suppose this was Partnership Property, I doubt whether the consequence is a conversion. There was no occasion to call for it for any of the purposes of the Partnership. It remains clear. Each might have entered into the enjoyment of his Share. Then suppose all die: why is it to be considered Personal Property, something different from what it really is, as between the real and Personal Representatives?"

In 1804, the Case of *Balmain v. Shore* (f) came before Sir *Wm. Grant*. There, three persons agreed to enter into Partnership, for 99 years, in the Business of Potters; and it was provided, by the Articles, that, in case of the decease of any of the Co-partners, his Share should belong to his Widow for her life, and that, after her decease her Share of the Joint Trade, should go to her Children, and, if there were no Child, to her Executors. Afterwards a China and Pot Manufactory and other Premises, were purchased by the Partners and conveyed to them as Tenants in Common

(f) 9 Vcs. 500.

be. The Conveyance then recited the Partnership, declared that the Premises should continue to be in the Partnership Trade during the continuance of the Partnership. Sir *William Grant*, after having referred to the nature of the Instrument, said: "Here the parties have limited and defined the extent of the interest the Partnership was to have in the Real Property. Considering themselves as Owners of the Real Estate, as Tenants in Common, they stipulate that the Partnership shall have a certain Ownership, notwithstanding that Interest in them as Tenants in Fee. The Premises are to continue to be used in the Trade, so long as the Partnership lasts. They can claim nothing as Partners, except through the Covenants. Subject to the Covenants, it goes as Real Estate. Whether the Partnership can derive any benefit, is another question. The question for my decision is, only, whether I can declare this Real Estate to be Personal Property, to go into the Shares of the Partnership. That, I am of opinion, I cannot declare." It is remarkable that, in this last case, no notice was taken of *Ripley v. Waterworth*.

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Selkirk v. Davies (g), Lord *Eldon*, in the course of his argument, threw out a proposition which is too general: his Lordship is reported to have said: "My individual opinion is that all Property involved in a Partnership concern, ought to be considered as Personal Property." The limitation of that proposition is to be collected from the Report of the Case, by which it appears that the proposition was laid down with reference to a Partnership of a Partnership in Trade, between Persons who have an Interest in Land for the purposes of the Trade. That that limitation ought to be put on the proposition, is evident

(g) 2 Dow. 230. 242.

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from what Lord *Eldon* says in the subsequent Case of *Crawshay v. Maule* (*h*): "It has been repeatedly decided that Interests in Lands purchased for the purpose of carrying on Trade, are no more than Stock in Trade. I remember a Case in the House of Lords, about three years ago"—which was the Case of *Selling v. Davies*—"in which the question was much discussed, whether, when Partners purchase Freehold Estate for the purpose of Trade, on dissolution, that Estate must not be considered as Personalty, with regard to the Representatives of a deceased Partner." So that Lord *Eldon* has put an interpretation on his own words, which, taken by themselves, go further than he meant they should go.

In *Townsend v. Devaynes*, which was decided before *Crawshay v. Maule*, Freehold and Copyhold Premises, consisting, in part, of Paper-mills, were purchased, by *Devaynes* and his Co-partners in the Business of Paper-makers, out of the Partnership Capital, and were used for the purposes of the Partnership Trade. Upon the death of one of the Partners, his Executors agreed to sell his Share to *Devaynes*, a surviving Partner, for 4700*l*. The only account that is to be found of that Case is in Mr. *Montagu's* Treatise on the Law of Partnerships (*i*); but it is difficult to ascertain the facts of the Case, or on what ground the decision was founded. Mr. *Jacob*, who notices the Case in his very valuable Edition of *Roper on Husband and Wife* (*k*), accounts for the decision on the supposition that there was an agreement, between the Co-partners, for the Conversion of the Property. At all events, that Case decides

(*h*) 1 Swans. 495. See 508.

(*i*) 1 Vol. Appen. 97. (*k*) 1 Vol. 346, note.

only, that, where Partners in a Trade purchase Land for the purposes of the Trade, it shall be considered as Personal Estate.

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In *Crawshay v. Maule* (1), Lands, and Coal and Iron-mines, held under Leases for years, were subjected to the purposes of a Partnership in Trade: and Lord Eldon, in observing on the Case, says: "It seems difficult to establish that this is an Interest in Land distinct from a Partnership in Trade; a mere Interest in Land, in which a partition could take place; for, when persons having purchased such an Interest, manufacture and bring to market the Produce of the Land, as one common Fund, to be sold for their common Benefit, it may be contended that they have entered into an agreement which gives, to that Interest, the nature, and subjects it to the Doctrines of a Partnership in Trade." In a subsequent page, he says: "For ordinary purposes, a Lease is no more than Stock in Trade, and, as part of the Stock, may be sold: nor would it be material that the Estate purchased by a Partnership was Freehold, if intended only as an article of Stock; though a question might, in that case, arise on the death of a Partner, whether it would pass as real Estate or as Stock, Personal Estate in enjoyment, though Freehold in nature and quality." Afterwards he says: "It is said that this is only the case of Tenancy in Common of a Mine: if so, I think that the doctrine with respect to Land, would apply, and not the doctrine with respect to Trading Partnerships: but a very difficult question may arise whether, if the Parties, being originally Tenants in Common of a Mine, agree to become jointly interested in the Manufacture of its Produce for the

(1) 1 Swan. 495. 518. 521. 523.

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purpose of Sale, they continue mere Tenants in Common of the Mine ; still more, if, not only carrying the Produce of their own Mine to market, they become Purchasers of other Property, of a like nature, to be Manufactured with their own." It subsequently appears that the Iron Works had been, from their first establishment, conducted as a Trading concern, and that large quantities of Iron had been and were manufactured at the Works, not only from materials obtained from the Leasehold Premises, but from Ore purchased in Lancashire ; and that the Proprietors were in the habit of purchasing old Wrought Iron, and of re-manufacturing it at the Works, and of selling it in its new state : and, accordingly, the Leasehold Property was considered as part of the Partnership Stock.

In *Fereday v. Wightwick* (m), the question did not arise as to Freehold Lands, but as to Leaseholds only. There six persons, having taken a Lease of Mines and another Lease of the Surface of the Lands under which the Mines were situated, worked the Mines and occupied the Surface Lands, as a Joint and Partnership concern. The *Master of the Rolls*, alluding to *Crawshaw v. Maule*, says : " Lord Eldon expressed a doubt whether, if persons previously entitled, as Tenants in Common, to Mines, were to form a Mining Concern, the general principles of a Partnership would apply to such a case ; and I am not aware that the particular point has ever been decided. But the distinction, here, is that the interest in the Mines was expressly acquired for the purpose of a Partnership ; and the general principle is, therefore, to be applied to it."

(m) 1 Russ. & Myl. 45. 49.

In *Phillips v. Phillips* (n), the Testator carried on the Business of a Brewer in Partnership with another Person; and he and his Co-partner purchased certain Freehold and Copyhold Public-houses, for the purposes of their Trade. The *Master of the Rolls* says: "I confess I have, for some years, notwithstanding older Authorities, considered it to be settled that all Property, whatever might be its nature, purchased with Partnership Capital for the purposes of the Partnership Trade, continued to be Partnership Capital and to have, to every intent, the quality of Personal Estate."

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The last Case in which the question was considered, is *Broom v. Broom* (o). In that Case, also, the Real Estates had been purchased by the Partners, out of Partnership Capital and for the purposes of the Partnership Trade.

Taking then the Law to be as it is to be collected from the Cases to which I have referred, the question is, whether the Real Estates in this Case, are to be considered as Personal Property. Now, it does not appear that the Parties purchased any part of the Land for the purposes of their Partnership in Trade. Having, in the first instance, agreed to carry on the Farming Business in Partnership, they subsequently agreed to become Co-partners, first as Maltsters, and afterwards as Biscuit-bakers. The first Purchase that they made was of an undivided Fourth part of an Estate of which they previously had a Moiety as Tenants in Common. It would, however, be strong to say that because these Parties, being Partners in the Farming Business which is not a Trade, happen, collaterally to that Business, to

(n) 1 Myl. & Keen, 649. 663.

(o) 3 Myl. & Keen, 443.

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carry on a Trade, therefore, the nature of the Property which they so purchased, is to be changed. And, consequently, I do not think that it would be right to hold that the One-fourth of the family Estates, which *Richard* and *William Randall* purchased of their Brother *James* is to be considered as partaking of the nature of Personal Estate.

The next Estate was purchased of *Miss Long*; but was never used for any of the purposes of the Partnership Trade: and, as the Judges who decided the Case to which I have alluded, have expressed their opinion to be, that Land cannot become Personal Estate, unless it is purchased for the purposes of the Partnership Trade, the Land purchased of *Miss Long*, although it may have been paid for out of the Partnership Capital cannot be considered as partaking of the nature of Personal Estate.

With respect to the Land purchased from *Tarver*, it was conveyed, as to one Moiety, to the use of *Richard Randall* in Fee, and, as to the other Moiety, to the use of *William Randall* and his Trustee, to the usual Use to bar Dower. Therefore, there was no Contract, either express or implied, that it should have any nature except that which was originally impressed upon it.

The Malting Business ceased in 1807, and the Biscuit baking, in 1815. In 1820, the two Brothers purchased two Houses and Gardens in *Portsea*, which, of course were not used for Farming purposes, but were let to Tenants. Those Premises were conveyed in the same manner as the Land purchased of *Tarver*: and if, in those instances in which the Lands purchased by the Brothers, were conveyed to them, it is to be inferred

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from the form of the Conveyance, that they intended to hold them as Real Estate, it is but fair to conclude that they intended to hold those lands which were not conveyed to them, in like manner; for it would be unreasonable to suppose that they meant to hold part as Land, and part as impressed with the character of Personal Estate.

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The fair inference to be drawn from the Facts of this Case, is that the Trade was collateral to and arose out of the principal Business of Farming: and there is no reason to conclude, from any of the decided Cases, that any of the Property to which this Suit relates, ought to be considered as Personal Estate.

Then as to the Costs: both Parties appear to have been asleep, so far as the present question is concerned; and it is too much to say, in a Case like this, which depends on a minute consideration of cases and of circumstances, that the Plaintiff is to blame because he has taken the Opinion of the Court; and, therefore, the Bill ought to be dismissed without Costs.

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20th and 27th
February and
6th March.

*Dissenting
Meeting-house.
Trust Charity.*

THE ATTORNEY-GENERAL AT THE RELATIO
OF CHARLES MANDER, INFORMANT, AN
THE SAID CHARLES MANDER, PLAINTIF
AND JOSEPH PEARSON, JOSEPH BAKE
AND ABEL WHITEHOUSE, DEFENDANTS.

In 1701 a Meeting-house was founded by certain Protestant Dissenters, for the Worship and Service of God. Held that no Doctrines ought to be taught in it which are opposed to the Opinions of the Founders; and, in ascertaining those Opinions, the state of the Law when the Meeting-house was founded, is to be regarded: as the Court will intend that the Founders did not mean any Doctrines to be taught, which were then illegal.

Parties.

A. was entitled to Rents up to a certain time, and *B.* was entitled to them subsequently. *B.* filed a Bill for an Account of the Rents for the whole period, alleging that he had satisfied all *A.*'s Claims, out of his own Monies, but did not make *B.* a Party. Held that *B.* was a necessary Party.

IN 1701 a Meeting-house or Place of Worship for Protestant Dissenters, was built in *Wolverhampton*, on Land granted for that purpose; and, by a Deed dated the 30th of October in that Year, it was declared that the Meeting-house was intended, by the Parties to the Grant and all others who had contributed towards the building of it, to be used for "the Worship and Service of God:" and, upon the death or removal of any one or more of the Parties to the Deed, the residue or the major part of them, were empowered, within two Months next following, to nominate and elect so many Persons to be Trustees for the purposes of the Deed, as should supply the vacancies of such of them as should die or remove from *Wolverhampton* and its precincts and this was directed to be done from time to time when need should require: and it was agreed that the Trustees should be 12 in number, and that the major part of them should make such orders with respect to any matters relating to the Meeting-house, as they should think convenient: And it was further declared that if, at any time thereafter, Meetings for the Worship and Service of God, should be prohibited by Law, and

thereby, the Meeting-house should become useless, it should be lawful for the Trustees to sell the Meeting-house and dispose of the Proceeds to such Charitable Uses as the Trustees should appoint, or, otherwise to convert it into Dwellings for the most Aged and Infirm people, "who should live in the Fear and attend to the Worship of God," as the Trustees should appoint; or otherwise to let the Dwellings, at Annual Rents, and to distribute the Rents, yearly, to the Poor: And it was provided that, if any Trustee should misbehave himself in the Management of the Trust, or do any thing scandalous or offensive to the rest, they should have power to remove him from the Trust.

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By Lease and Release of the 1st and 2d of February 1720, one *Scott* conveyed an Acre of Land in *Wolverhampton*, to Trustees, in Trust for the support and maintenance of the Minister of the Meeting-house; but *in case the Toleration Act (a) should, at any time thereafter, be repealed, and the Congregation should, by Law, be prohibited to assemble for the Worship and Service of God,* then, during the continuance of the Prohibition, to pay the Rents to the Person that was the Minister, for his life, and, after his death, to such Licensed Protestant Dissenting Minister as the Trustees should appoint: And it was provided that, when any of the Trustees should die *or desert the Congregation, and become of any other Religion or Persuasion whatsoever contrary or different from the said Congregation,* or should remove Eight Miles from *Wolverhampton*, the other Trustees

(a) 1 W. & M. sess. 1, chap. 18. By sect. 17, persons denying the Trinity were excepted from the protection of the Act: but by 53 Geo. 3, chap. 160, that exception was repealed.

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should elect another of the Congregation to succeed him, so that the Trusts thereby declared might not vest in the Heir of any surviving Trustee, or in any Person that was not, at the time, a Member of the Congregation.

Afterwards Sums of Money were given, from time to time, by different Persons, for supporting the Minister—repairing the Meeting-house and for other Purposes connected with it.

The Founders of the Meeting-house, and the original Subscribers and Contributors to it, were Dissenters of the Presbyterian Sect or Denomination, and it was alleged that they believed in the Doctrine of the Trinity as Presbyterians in general did, in and about 1701. In the course of time, however, a change of opinion gradually took place in the Sect, and the greater number repudiated that Doctrine. The new Principles gained ground amongst the Congregation of the Meeting-house in question; and, for some years before the end of the last Century, the Trustees, Ministers and the Majority of the Congregation, had ceased to be Trinitarians.

In 1817, a majority of the Trustees and Congregation took steps for removing Mr. *Steward*, the then Minister, from his office, in consequence, as it was alleged, of his having preached Trinitarian and Calvinistic Doctrines, and elected, as his Successor, another Minister, whose Opinions were in unison with their own.

In consequence of these proceedings, an Information and Bill was filed, stating that, in 1776, *Benjamin Mander*, one of the Plaintiffs in that Suit, was duly

appointed a Trustee of the Meeting-house, jointly with the then surviving or continuing Trustees, all of whom had since died: that the Meeting-house was originally built by Protestant Dissenters professing Trinitarianism, and, for many years, such principles were professed by the Subscribers and Congregation, and the Ministers officiating therein from time to time, were Trinitarians: that, in 1782, a division of opinion arose, between the Trustees and the Subscribers, as to who should be appointed Minister, and that the minority, having got possession of the Meeting-house, appointed the Rev. Mr. *Griffiths*, and excluded the Rev. Mr. *Jameson*, who had been elected by the majority, therefrom: that, ever since that time, the Trust Premises had been appropriated to support and teach Doctrines wholly opposed to those of the original Founders, and contrary to the original Trusts or Intentions of the Institution, which, as the Plaintiffs alleged, were for promoting the belief of the Doctrine of the Trinity: that there had been no regular Nomination of Trustees since *Mander* was appointed, although the Defendants to that Suit, claimed to be Trustees: that the Rev. Mr. *Steward*, the other Plaintiff, was then and had been, for some time, the Minister, and was entitled to the full Emoluments of the Office; but the Defendants had paid him a small portion of them only; and that *B. Mander*, as surviving and sole Trustee, was entitled to the possession of the Trust Premises. The Information and Bill prayed for a Declaration that *B. Mander* was entitled to the Possession of the Meeting-house, and that he might be quieted in such Possession, and that *Steward* might be quieted in his Office of Minister and in the use of the Meeting-house: and that the Defendants might account, to *B. Mander*, for all Monies received by them in respect of the Trust

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Premises, and pay to him what should be found due = that new Trustees might be appointed jointly with *B. Mander*: and that the Defendants might be restrained from intermeddling with the Meeting-house and from proceeding at Law to obtain possession of it, and from interfering in the execution of the Trusts, or nominating any Minister in *Steward's* place, without *B. Mander's* consent.

The Defendants to that Information and Bill having put in their Answer, the Plaintiffs moved for an Injunction to restrain them from further proceeding in the Ejectment which they had brought against the Plaintiffs for the recovery of the Trust Premises (b). The *Lord Chancellor* granted the Injunction, and referred it to the *Master* to inquire in whom the Legal Estate in the Trust Premises was vested; what was the nature and particular object, with respect to Worship and Doctrine, for the observance, teaching and support of which each of the Charitable Funds or Estates was created or raised, distinguishing when and by whom the same were respectively created or raised; and what was the usage of Protestant Dissenters as to the Election of their Ministers and the Duration of their Office: This Order was never drawn up.

In 1819 *B. Mander* died, and the Suit was, afterwards, revived against *Charles Mander*, as his Heir. In April 1822 the Cause was heard and a Decree was made directing the same Inquiries as the Order of 1817 had directed, and also who were proper Persons to be Trustees of the Funds and Estates, and who had, from time to time, been in the occupation or receipt of the

(b) See *Attorney-General v. Pearson*, 3 Mer. 353.

the Property : and the *Master* was directed to account of all such Rents received since the 1. of the Suit, and to set an Occupation Rent part of the Premises as should be found to be in the Occupation of any of the Parties to the

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decree was not drawn up.

817 no attempt was made to deprive *Steward* ice, and he continued Minister until 1827, when ed. Since that time no permanent Minister appointed, and *Charles Mander* had procured tant Dissenting Minister to preach in the house, and had repaired it at his own expense, ders from the Congregation repaired to another 1 *Wolverhampton*, where doctrines in accordance r own opinions were inculcated.

2 the Information and Bill in this Case, was inst the three surviving Defendants to the uit, alleging that, according to a custom long ed in the Meeting-house, no new Trustee could n without the consent of all the surviving or g Trustees for the time being; that *Benjamin* did not consent to the Nomination of the De- and the other Trustees appointed with them, efore, they had not been duly appointed; and r that they were disqualified from being Trus- ause they did not believe in the Doctrine of ity, but professed Unitarianism, which was opposed to the Doctrine for the support and ion of which the Meeting-house was Founded, h was, at that time, illegal : That, on the 7th of

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February 1827, *Steward* resigned his office of Minister, and all his Claims were satisfied, by the Plaintiff, out of his own Monies, since which time *Steward* had not had or claimed any Interest in the Trust Premises, or in the Monies for which the Defendants might be accountable.

The Information and Bill prayed for a Declaration that the Meeting-house and other Property ought not to be applied to the support or teaching of the Doctrines of any Sect of Protestant Dissenters who denied the Trinity, or professed any opinions which, at the time of the erection of the Meeting-house, could not be legally taught or preached; and for a Declaration that the Defendants were not duly appointed Trustees, or, if they were so appointed, that they ought to be removed and some proper Persons appointed new Trustees jointly with the Plaintiff; and that the Defendants might account, with the Plaintiff, for all the Monies received by them in respect of the Trust Premises, and pay to him what should be found due; and that an Account might be taken of the Monies expended, by the Plaintiff, in repairing the Trust Premises, and that the amount might be paid to him out of the Monies to be found due from the Defendants, or be raised out of the Trust Premises: and, if it should appear that there was any existing Decree or Order in the former Suit, the prosecution of which in this Suit, would be attended with convenience and a saving of expense, then that this Suit might, so far, be considered as in the nature of a Supplemental Suit, and that such Order or Decree might be prosecuted: and that the Defendants might be restrained from receiving or intermeddling with the Rents or Profits of the Meeting-house and other Pre-

mises, and from proceeding at Law to recover possession thereof, and from interfering in the Execution of the Trusts or in the Election of a Minister.

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The Answer stated that it was impossible to say what were the particular Religious Opinions of the persons by whom and for whose use the Meeting-house was erected; but, according to the best of the Defendants' information and belief, it was erected by Voluntary Contributions of a number of Protestant Dissenters resident at *Wolverhampton*, of various shades of Opinion, but who agreed in the principle of Dissent from the Church of *England*, and proposed to assemble at the Meeting-house for the Worship and Service of God: that, according to the best of their judgment and belief, and so far as they had any historical Information on the subject, the original Congregation was composed of the Descendants of the Independents, Presbyterians and other Non-Conformists of the preceding age, and of persons newly dissenting from the Church of *England*: that, so far as they had any recollection or had been informed by persons then deceased, the Meeting-house had always gone by the name of "The Presbyterian Meeting-house at *Wolverhampton*;" and they believed that the bulk of the Congregation, originally, and from time to time since, had consisted of English Presbyterians and not Calvinists: that the original Deeds of Trust and Endowment of the Meeting-house, did not prescribe any stated form of Christian Worship to be observed, nor any stated set of Opinions or Doctrines to be preached or taught in the Meeting-house; and that, to prescribe any such, would have been inconsistent with the principle of Dissent then and ever since acted upon by the Protestant Dissenters of *England*; for that the great principle upon which the Protestant Dis-

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senters founded their separation from the Church of *England*, was the sufficiency of the Holy Scriptures as the rule of Faith and Practice, and the right of private and uncontrolled judgment in the Interpretation of the Scriptures and the settlement of their Worship and Services; and, therefore, the Defendants believed that the Meeting-house was not erected as a place of Worship for Protestant Dissenters from the Established Church entertaining such Opinions as in the Information and Bill mentioned, or any stated set of Opinions in particular; but was designed for the use of the Congregation then formed, and of such Protestant Dissenters resident in *Wolverhampton* as should, from time to time, resort to the Meeting-house and be received into the Congregation for the Worship and Service of Almighty God according to the pure Doctrines of Christianity as revealed in the New Testament: that, according to the best of their information and belief, the Rule and Practice of the Congregation, had always been (and which they believed was the general Rule and Practice of Dissenting Congregations in *England*) that the affairs of the Congregation, whether relating to Faith, Worship or Discipline, should, from time to time, be regulated and determined by the Congregation for the time being, leaving it to such individual Members of the Congregation as differed from the views of the majority, to withdraw from the Congregation and unite themselves to other Congregations entertaining religious opinions more in unison with their own: that they believed such Rule and Practice was in accordance with the views and intentions of the original Founders of the Meeting-house and Congregation: that, save as before-mentioned, they could not set forth whether the Meeting-house was originally built by Protestant Dissenters professing a belief in the Trinity, nor whether, for many

years, such belief was professed by the Subscribers to and Congregation assembling in the Meeting-house; but they believed that the Doctrine of the Trinity, as contained in the Articles of the Church of *England*, was not impugned by the Congregation, and that, in Worship and Preaching, they complied with the requisitions of the Law from time to time existing: that they were advised that the Worship and Service of God by Protestant Dissenters, without any reference to a Trinity of Persons, had been, at all times, lawful since the foundation of the Meeting-house; and they denied that the Funds and Endowments were, by the Trusts thereof declared, or, by the intentions of the Donors, as far as the Defendants knew or believed, directed to be expended in promoting a belief of the Doctrine of the Trinity, but, on the contrary, were expressed and intended to be for promoting the Worship and Service of God, without any mention of the form of Devotion to be observed, or of the particular Doctrine to be taught: that it might be true that the Funds and Endowments were, for many Years, laid out in promoting a belief of the Doctrine of the Trinity, and that the Ministers were Trinitarians; but that the Funds and Endowments were not, by the Deeds, required to be so laid out, and, if the same had been so done, it was in compliance with the sentiments and wishes of the majority of the Congregation for the time being: that they had no recollection of the Doctrine of the Trinity being taught in the Meeting-house: that, for many years prior to 1782, Mr. *Cole* was the Minister of the Meeting-house, and the Defendants were then Members of the Congregation, but neither he nor any of his Successors preached that Doctrine, until Mr. *Steward*, in 1816, on a change in his Opinions, began to preach that and other Doctrines at variance with the Opinions of the Congregation: that they

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could not set forth whether Mr. *Hill*, one of the persons stated in the information to have made Donations to the Meeting-house, was a Calvinist, but, at the time when he made the Donation, the Doctrines of Calvin were not preached in the Meeting-house or entertained by the Congregation : that the Defendants were advised that there never was any law, since the foundation of the Meeting-house, which rendered it illegal for Protestant Dissenters to celebrate the Worship and Service of God on Unitarian Principles ; and that, judging from what they knew of the religious History of those times, they believed that many of the Congregation from time to time attending the Meeting-house from the foundation thereof, entertained Opinions similar to those entertained by Protestant Dissenters now called Unitarians : that, whether such Opinions and Doctrines could or not be legally taught when the Meeting-house was built, they might be now legally taught, and that such teaching, in case the Congregation for the time being approved the same, was not inconsistent with the provisions of the original Trust Deed or with the intention of the Founders of the Congregation : that gradual changes of Opinion, both as to Doctrine and Modes of Worship, had, from time to time, taken place in the Congregation, as in all other Dissenting Congregations, but the Congregation had, from time to time, always continued the same, being composed of descendants of the original Founders and of Protestant Dissenters resident in *Wolverhampton* holding Opinions in unison with the Congregation for the time being, and had continued to act upon the same leading and fundamental Principles upon which they were originally united together : that it was no where expressed, in the Trust Deeds, nor could it have been intended, by the Founders, that the Congregation should always hold the same Opinions as the

Founders, of which there was, in fact, no record ; but that they must have intended that the Congregation should, from time to time, regulate, amongst themselves, all matters relating to Faith, Worship and Discipline, in conformity to the practice of other Dissenting Congregations : that, to the best of their belief, it was not the intention of the Founders to promote the belief of the Trinity any longer than it should be the belief of the Congregation ; and they admitted that they did not believe in the Trinity but in the unity of God, and in the divinity of the Mission but not of the Person of our Saviour ; and that they believed the Old and New Testament to contain the revealed will of God, and received the same as the rule of their Doctrine and Practice : but that there was no defined set of Doctrines which were universally received and acknowledged as the Doctrines of Unitarianism. The Defendants then set forth the proceedings in the prior Suit, and submitted that all the relief (if any) to which the Informant and Plaintiff might be entitled in this Suit, might have been obtained under the Decree in the former Suit, and, therefore, that the present Information was unnecessary and ought to be dismissed with Costs : that they could not set forth whether the Plaintiff had satisfied *Steward's* claims (if any he had) out of his, the Plaintiff's, own Monies ; but, if such claims had been so satisfied, the Defendants were still liable to have the Decree in the former Suit prosecuted against them : they admitted that they had, since 1817, received the Rents and Profits of the Trust Lands and Premises mentioned in the Information.

The Cause having been called on, Mr. *Rolfe* and Mr. *Booth*, for the Defendants, objected that *Steward* was not a Party to it.

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If two individuals are entitled to Rents, the one up to a certain time, and the other, afterwards, the latter alone cannot file a Bill for an Account of the Rents accrued during the whole period, although he may allege that he has satisfied the former's demands. There is nothing to secure the Defendants against a similar Information on behalf of *Steward*, claiming the Rents from 1817 to 1827, or against the prosecution of the Decree in the original Suit. The Information represents that the Plaintiff has settled with *Steward*: but he had no power to settle with him: he is not a Trustee: but, at the utmost, he has, only, become seised of the Legal Estate as Heir to his Father. He is the Purchaser of a Party Right in an existing Suit, and is, in fact, the Assignee of a *Chose in Action*.

Mr. *Knight* and Mr. *James Russell*, for the Information and Plaintiff:

All the objects of a Charity are not necessary Parties to an Information respecting it. Mr. *Steward* will appear and disclaim if necessary. If a Party enters his Appearance and disclaims at the Bar, he is bound by the Decree. *Capel v. Butler* (c).—[The *Vice-Chancellor*: In that Case the Party was named as a Defendant.]—But he had not appeared, nor had he been served with *Subpœna*. The Record may be brought into Court and *Steward's* name may be inserted in the Prayer of Process.

THE VICE-CHANCELLOR:

If a Party is named as a Defendant on the Record, he may, if the Plaintiff consents, enter his Appearance with the Registrar at the Hearing: but, where he is not named as a Party, the Court cannot, without the consent of all the

Parties to the Suit, allow him to appear at the Hearing and submit to be bound by the Decree (d).

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In consequence of the above Objection having been allowed, a Supplemental Information and Bill was filed against *Steward*, stating a Deed of the 21st of February 1835, by which *Steward*, for a valuable Consideration, assigned, to the Plaintiff, all Sums of Money that became due to him, in and after 1817, as Minister of the Chapel, and all his Claims and Demands on the Trust Property : and, *Steward* having put in his Answer and admitted the Assignment, the Cause again came on for Hearing.

Mr. Knight and Mr. James Russell:

The Meeting-house could not have been founded for the purpose of propagating Unitarian Doctrines; for those Doctrines could not then be legally taught (e). Persons who denied the Trinity, were not only excepted from the protection of the Toleration Act, but, by the 9th and 10th Will. 3, c. 32, which was passed three years only before this Chapel was founded, such persons were subjected to heavy Penalties and Disabilities. The language of the Deeds places it beyond all doubt that the Chapel was founded for the teaching of Doctrines, which, at the time of the foundation, were legal. The Deed of 1701 declares that if, at any time thereafter, Meetings for the Service and Worship of God, *should be prohibited by Law &c.*: and the Deed of 1720 expressly mentions the Toleration Act, and provides for the event of its being repealed and the Congregation prohibited,

27th February.

(d) See *Bozon v. Bolland*, 1 Russ. & Myl. 69.

(e) See the Judgment in *The Attorney-General v. Pearson*, 3 Mer. 411, et seq.

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by Law, to assemble for the Worship and Service of God. The construction of a Deed cannot be affected by an alteration in the Law. The Chapel was registered which it could not have been, if it had been a Unitarian Chapel; and, in the Licence, it is termed a Presbyterian Chapel. The Opinions of the original Presbyterians with respect to the Trinity, accorded with the Doctrine of the Established Church on that subject. The chief, if not the only point on which they dissented, was Church Government. Our Evidence shows that the Congregation who attended the Chapel up to 1780, were Trinitarians.

At all events this Court will not allow the Revenues of a Charity to be severed from the Charity.

Mr. Rolfe, Mr. Booth and Mr. Falconer, for the Defendants :

The question is whether the maintaining of any particular Tenets, is necessary to the execution of the Trusts created by the Deeds by which this Chapel was founded and endowed. It was founded by certain Protestant Dissenters who, in the beginning of the 18th Century, were called Presbyterians. The characteristic of that Sect was that they admitted of no Creed, but all persons who received the Holy Scriptures as the Word of God, were admitted to the Communion of their Church. They abjured all Tests and every restraint on the freedom of inquiry, and left every one at liberty to entertain and inculcate those Doctrines which were the result of that Inquiry. The language of the Deeds, as is the case in all the Presbyterian Trust Deeds of the same period, is very general. They do not, like the Deeds of almost every other class of Dissenters, prescribe what particular Doctrines are to be preached in the Chapel. All that is

expressed in the Deed of 1701, is that the Meeting-house was intended to be used for the Service and Worship of God. If the Founders had intended to limit the Doctrines to be taught in the Chapel, they would have followed the example set them by other Dissenters, and have mentioned them specifically. Assuming that the Opinions of the Presbyterians have undergone a change since the Chapel was founded, can the Court say, in a Case where no particular mode of executing the Trust is pointed out, that it ought not to be extended to the inculcating of those Doctrines which may be lawful from time to time, and which the Congregation may approve of. Suppose that, when it was unlawful to sell Game, some person had built a Market as a Charity; it is clear that the Founnder could not have contemplated that it would be used for the sale of Game: yet no one can doubt, now that it is lawful to sell Game, that the Market might be used for that purpose. If a person were now to found a Chapel for the Service and Worship of God, the Court could not say that Unitarian Doctrines should not be preached in it. Where a Chapel is founded, expressly, for inculcating the Doctrine of the Trinity, or such Doctrines only as were lawful at the time of the Foundation, the force of the express Terms would prevail: but, where the Founder expresses himself with such generality as in the present Case, every Doctrine that might be lawful at the time, would be included. If the Deed itself imposes no restriction as to the Doctrines to be promulgated, the Court cannot look out of the Deed for the purpose of finding a restriction. If a Chapel were founded at this day, by a Unitarian, for the Service and Worship of God, and the Minister, Trustees and all the Congregation, were, at some future time, to be convinced of their error and become Converts to Trinitarianism, would this Court compel them to

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continue in error, although the Chapel was founded simply, for the Service and Worship of God.

The Suit instituted in 1817, is still pending: a Decree was made in that Suit; why is not that Decree produced? The Defendants are doubly vexed by the institution of the present Suit, which puts in issue the same facts as the former Suit.

Part of the Funds was given to the Chapel during the time when the Unitarian Doctrine was preached in it. The Decree ought, therefore, to direct an Inquiry, at what times the several Gifts were made to the Chapel; and it must also declare what Doctrines ought to be preached in the Chapel, and not, merely, what Doctrines ought not to be preached in it.

The VICE-CHANCELLOR :

5th March.

When, as in the present Case, a Gift is made or a Trust is created by certain persons, of certain Funds, for the Service and Worship of Almighty God, the thing to be regarded, is what were the religious Tenets in general of those persons? Because it would not be a just application of those Trust Funds, if they were allowed to be employed for the sustentation of religious Opinions which the Donors, themselves, would have disavowed. The state of the Law, too, at the time when the Gift was made or the Trust created, is not to be disregarded. It must be regarded in some sense and some degree; because it may assist in determining what were the Opinions of the persons who created such a religious Trust as we find in this Case. And if we find that, at that time, the preaching and promulgation of certain Doctrines and Opinions were prohibited by the Statute Law, it may be reasonably inferred that the

persons who created the Trust for the Worship and Service of God, did mean such a Trust as would not include the promulgating of those Doctrines and Opinions which, at the time, it was illegal to promulgate.

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I have heard and read a great deal about the extreme anxiety which was manifested by the Presbyterians, the Independents and the Baptists (the three principal classes of Dissenters) to have their Societies unfettered by Creeds: I cannot, however, but think that, in their minds, it was of much more importance that their Ministers should inculcate certain religious Doctrines upon the minds of their hearers, than, simply that they should be at liberty to preach what they pleased; and that they thought that the supporting and inculcating of certain Doctrines, assumed by them to be religious truths, was of more importance than the method by which those truths should be disseminated. They meant, without doubt, that those Opinions should be taught which they themselves entertained; but they objected to their being taught by means of a Creed: and the result has shown how very much their object has failed with respect to the Presbyterians at least. In a late Edition of *Neal's History of the Puritans*, it is stated that, in almost all the Presbyterian Congregations, there has taken place a change of Opinions, and that they have swerved from the Doctrines of their Forefathers and have now become advocates of very different Tenets.

My Opinion, therefore, is that, looking at what, as is not denied, were the Opinions of the Presbyterians at the time when this Charity was founded (which was from 1701 to 1726) we may reasonably infer that they never could have meant that that particular Doctrine should be taught, in this Chapel, as part of the Worship and

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Service of God, which is attacked by the present Information. So, supposing the state of the Law has permitted it, if the persons who founded this Chapel have been Mahometans, and they had directed that it should be used for the Service and Worship of God, I should have thought it to be a matter of course, that they must have meant the Service of God by means of disseminating Mahometan principles. And unless the construction which I have mentioned can be put on the language of these Deeds, there is no limit to the Doctrines which might be said may be taught in this Chapel consistent with the views of the original Founders.

The Decree, therefore, ought to be so framed as to exclude, those particular Doctrines which the Information complains of, from being preached in the Chapel. But I do not agree with the Defendants' Counsel, that the Decree ought to specify, affirmatively, all the Doctrines that may be taught; for that would be endless. If the Charity is found in such a state that some Opinions are intended, by the present Holders of the Chapel, to be disseminated which one may be reasonably sure were not contemplated by the original Founders, it is quite sufficient to declare that those Opinions shall not be maintained by the persons who preach in the Chapel, and those persons who do avowedly maintain the Opinions which according to the view of the Court, ought not to be preached in the Chapel, ought not to be Trustees of the Chapel: for there is a manifest incongruity in having persons of one strong religious belief administering a Trust created in favour of persons of another religious belief.

I say this without, in the least, animadverting on the personal character of the Gentlemen who are concerned.

because I know nothing whatever to impeach it: and it is, merely, because they entertain Opinions which, in my opinion, ought not to be preached in the Chapel, that I shall direct them to be removed from being Trustees of the Trust Property, and direct other persons to be appointed in their place, who do not profess those Doctrines and Opinions.

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Declare that the Meeting-house, Tenements and Hereditaments and other Property in the Pleadings mentioned, ought not to be applied to the support or teaching of the Doctrines of any Sect of Protestant Dissenters who deny the Doctrine of the Holy Trinity, or profess Opinions as to the Christian Religion, which, at the time of the erection of the said Meeting-house, could not be legally taught or preached therein.

In the course of the Argument, Mr. *Knight* objected to a Deed being proved, *vivâ voce*, at the Hearing, because one object of the Suit was to impeach it.

Proof of Deeds.

If the validity and not the execution of a Deed is questioned in a Suit, it may be proved *vivâ voce* at the Hearing.

The *Vice-Chancellor* ruled that, if the *execution* of the Deed was questioned, it could not be proved: but if its execution was admitted, and its validity questioned, that, it might be proved *vivâ voce* *.

* The Case of The *Attorney-General* v. *Shore*, related to Charities founded by Lady *Hewley*, a Presbyterian, about the same time as the Chapel in the Case reported above, and was similar, in many respects, to that Case. It was heard, before The *Vice-Chancellor*, in December 1833. The effect of his Honor's Decree was to exclude Persons professing Unitarian Opinions from participating in the Benefit or Administration of the Charity. From that Decree the Defend-

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ants appealed to The *Lord Chancellor*. The Appeal was argued, in 1834, before Lord *Brougham*, C., assisted by Mr. Justice *Littleale* and Mr. Baron *Parke*. His Lordship, however, resigned the Great Seal before he had given his Judgment. In 1835 the Appeal was re-argued before Lord *Lyndhurst*, C., assisted by Mr. Baron *Alderson* and Mr. Justice *Patteson*. But, before the Judgment was given, Lord *Lyndhurst* had resigned the Great Seal. The Parties, however, agreed to submit to his Lordship's Decision, and, accordingly, on the 5th of February 1836, the Opinion of the two learned Judges was delivered by Mr. Baron *Alderson*, and the Judgment was delivered by Lord *Lyndhurst*. The following passages are extracted from an authentic Report of the Judgment :

“ I agree entirely in the principle, stated by the learned Judges, upon which this Case must be decided. In every case of Charity, whether the object of the Charity be directed to religious purposes or to purposes purely Civil, it is the duty of the Court to give effect to the intent of the Founder, provided this can be done without infringing any known rule of Law. It is a principle that is uniformly acted upon in Courts of Equity. If, as they have stated, the terms of the Deed of Foundation be clear and precise in the language, and clear and precise in the application, the course of the Court is free from difficulty. If, on the other hand, the Terms which are made use of are obscure, doubtful or equivocal, either in themselves or in the application of them, it then becomes the duty of the Court to ascertain by Evidence, as well as it is able, what was the intent of the Founder of the Charity, in what sense the particular expressions were used. It is a question of Evidence, and that Evidence will vary with the circumstances of each particular Case; it is a question of fact to be determined, and the moment the fact is known and ascertained, then the application of the principle is clear and easy.

“ It can scarcely be necessary to cite Authorities in support of these principles. They are founded in common sense and common justice; but if it were necessary to refer to any Authority, I might refer to the Case which has been already

mentioned, the Case of *The Attorney-General v. Pearson*, and another Case which was cited at the Bar, the Case in the House of Lords. Throughout those Judgments, the principles which have been stated were acknowledged and acted on by a noble and learned Judge, of more experience in Courts of Equity, and more experience in questions of this nature than any other living Person. I look upon it, then, that these principles are clear and established, that they admit of no doubt whatever.

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"What then were the objects and the purposes of this Charity? We look at the Deed of Foundation, and we find in it (the Deed of 1704) that the object was to assist poor and godly Preachers of *Christ's* Holy Gospel; to assist poor and godly Widows of the same description of Persons; to promote and encourage the preaching of *Christ's* Holy Gospel in poor Districts and Places; to assist in the Education of young Persons intended for the Ministry of *Christ's* Holy Gospel; to assist poor and godly Persons in distress. These are the objects of the Deed of 1704. The Deed of 1707 provides for the maintenance of 10 poor Persons in certain almshouses that were founded by Lady *Hewley*. The rest of the Property is directed to be applied to the same objects are mentioned in the original Deed of 1704.

"This is the substance of the provisions of the two Deeds; and the first question that arises, and essentially almost the only question, is this, Whom did the Foundress of this Charity mean to designate by poor and godly Preachers of *Christ's* Holy Gospel? And what were the Principles and Doctrines of which she intended to encourage and promote the teaching?

"It may be said, that the expression 'poor and godly preachers' is clear and precise; but it is admitted on both sides, as well on the part of the Relators as on the part of the Defendants, that it does not include Ministers of the Established Church. However poor, however godly, however pious, by the admission of the Parties, they are excluded, and rightly. It appears, therefore, that the terms poor and godly

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Preachers are to be taken with some limitations and restrictions; and the question, therefore, is, what are the proper limitations and restrictions in this instance?

“ The first question then for consideration, in order to lead us to a correct conclusion upon this point, is, as to the particular religious Opinions of Lady *Hewley*, the Foundress of this Charity. There can be no doubt that she was, in her religious Faith and Opinions, a Presbyterian.

“ This being so, then, the next question in order is, what were the Doctrines and Opinions of the Presbyterians at that time? Upon this also I think no reasonable doubt can be entertained. The Presbyterians objected only to those Articles of the Established Church that related to matters of discipline and Church government. They did not object to any of the doctrinal Articles of the Church of *England*. It is stated by the Witnesses, and there is no contradictory Evidence, that the Presbyterians of that day were believers in the Trinity and in the doctrine of Original Sin, as contained in the Articles of the Church of *England*. If we go further we find the same points, to a degree at least, admitted in the Answers of Mr. Wellbeloved and others of the Defendants. Very many, they say, of the Presbyterians of that day believed in the doctrine of the Trinity. The admission is qualified by the term ‘very many,’ which admits of an extensive latitude of construction; but coupling this with the Evidence, I am justified, I think, in coming to the conclusion, that the great Body of the Presbyterians were in their Opinions Trinitarians.

“ If it were necessary to go further into this Case for the purpose of showing what were the Opinions of the Presbyterians at that time, I might refer to the Act of Toleration. It is well known that the Dissenters were consulted in framing that Act, and that they were satisfied generally with its provisions. But we find, in the 17th Section, that no Person is allowed to preach, or is relieved from the Penalties of former Acts of Parliament in preaching, unless he subscribes the Articles of the Church of *England*, with the exception of the

5th, 36th and part of the 20th, which do not relate to
 1 matters, but relate merely to Church government
 2 ters of that description. The whole of this Evidence,
 3, leads me to the conclusion, about which I think no
 4 le doubt can be entertained, that the great body of
 5 byterians, as well as the Independents of that day,
 6 at the commencement of the 18th century, believed
 7 doctrine of the Trinity and in the doctrine of (Original
 8 ch is contained in the Articles of the Church of Eng-
 9 and other Documents to which I have referred. Was
 10 ewley, then, an exception to this general rule, as to
 11 ith reference to the doctrine of the Trinity and with
 12 to the doctrine of Original Sin? It appears to me,
 13 have established that she herself was a Presbyterian,
 14 the general doctrines of Presbyterianism were such
 15 : stated, that it is incumbent upon those who contend
 16 : was an exception to the general belief, to give Evi-
 17 x the purpose of establishing that fact; that the
 18 of proof is upon those who make that assertion or
 19 ggestion. But, waiving this, what are the probabili-
 20 the case? It is well known that the principles of
 21 nism were at first very coldly received, and were
 22 to with aversion, and even with disgust, more parti-
 23 among the Laity. Lady Hewley, at the time to which
 24 erring, was a person advanced in life. Is it probable,
 25 at she should have adopted these Opinions, and upon
 26 hich, in one of the Documents before me, are stated,
 27 by Dr. (Mr.) Kenrick, to have been considered by
 28 ches essential?

ave thus endeavoured to show that Lady Hewley was
 yterian, and to show what were the general doctrines
 Presbyterians at that time. And the result of the
 Inquiry has been to satisfy my own mind that Lady
 was not an exception to the general rule of belief of
 as of Dissenters to which she belonged, but that she
 also was a Trinitarian, and a believer in the doctrine
 nal Sin.

at being the case, then, we are prepared for the more
 ury consideration of the next point, What did she

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mean by 'Godly Preachers of *Christ's* Holy Gospel?' What were the Doctrines the preaching of which she meant to promote and encourage? Is it possible to come to the conclusion, according to any ordinary rules of reasoning, that she intended to found a Charity and bestow her Property for the purpose of preaching doctrines directly at variance with her own? And this, not as to subordinate and trifling and formal matters, but with respect to points that have always been considered by every Church as essential, which she herself must have considered as essential.

"Can we believe, then, I repeat it, that this pious Lady would have given her Funds for the purpose of promoting and encouraging the preaching of Doctrines directly at variance with those Opinions which she entertained upon points which have been universally considered as essential in matters of religious belief? At least it would require some fact or some argument to justify us in coming to such a conclusion. All the presumptions and probabilities are the other way; and, as a question of fact, I feel myself obliged to come to this conclusion, that it is almost impossible to suppose that such could have been her view and intention.

"But another argument arises out of the Act of Parliament to which the learned Judge has referred, or rather out of the Acts of Parliament of that period. Those Preachers who denied the Deity of *Christ* were exempted, if they preached, from the benefit of the Act of Toleration. That Act was passed in the year 1688. In 1698, 10 years afterwards, and six years before the date of the first of these Deeds, the Act against blasphemy was passed, in which those persons who denied that any one of the three Persons in the Trinity was God, were subject to the severest Penalties. Those were called impious and blasphemous Doctrines; to teach them was called a detestable crime. I am not justifying the Law—I am making no comment upon it—I am stating only what the Law at that time was. Those persons who by preaching denied the doctrine of the Trinity—I think the word is 'teach'—who either in writing, in teaching, or advised speaking, shall maintain those Doctrines, are subject to the

it are the rules by which the conduct and the lan-
Persons are to be interpreted? The rule is this—
a fair and proper rule—that where a construction
t with lawful conduct and lawful intention can be
on the words and acts of Parties, you are to do so,
unnecessarily to put upon those words and acts
action directly at variance with what the Law pro-
enjoins. I cannot therefore bring myself to the
n, that Lady *Hewley* intended to promote and en-
be preaching of Doctrines contrary to Law—that she
herself to violate the Law. It would be contrary to
e of fair construction and legal presumption, so to

is argued, however, at the Bar, that this Law was
uled ; and it was supposed that the repeal of the Law
ake an alteration in the consideration of the case.
ot appear to me, in the slightest degree, to affect
on. The question is, what was her intention at the
What, at the time when she executed this Deed, she
Who were the Persons whom she meant to include
What were the Doctrines of which she intended to
and promote the preaching? It makes no altera-
is respect—it makes no change as to her intention
e, that, a century after, the Law has been changed,
s considered as innocent which at that period was
l as illegal. On these two grounds then, each of

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to the Law, and her respect for its authority, we
Evidence of it in the second Deed, the Deed of 171
says, that if by any lawful authority the objects of h
in that Deed, cannot be carried into effect, then
her Trustees to make a different application of the

" It has been said, and the learned Judge has s
it; it has been said, in general terms, that the reli
nions of that day were liberal and comprehensive, s
particular, Lady *Hewley* entertained large and lib
upon subjects of religion. This, however, rests o
statement, of which there is no sufficient or satisfi
dence, and from which I can come to no precis
tory conclusion. I am bound, therefore, for thes
having first established to my satisfaction, that al
her religious opinions and belief, a Trinitarian,—I
compelled to come to the conclusion, that she
tended that her Bounty should be applied for the
promoting or encouraging the preaching of Unit
trines. This is the conclusion of fact to which I h
and I have the more satisfaction in this result,
came to it without at all knowing what were the
my two learned Friends, without having had any co
tion with them upon the subject. I formed my Opi
a careful consideration of the case, thus agreeing, i
the conclusions but in the grounds and principles u
the learned Judges have come to them, who have
me with their assistance on this occasion.

" The question, then, for consideration that
this,—By whom have these Funds been administe

unds, but, that in the exercise of their Trust, they have
 ested a strong and undue leaning in favour of persons
 rown persuasion. I think, then, looking at these cir-
 cstances, and considering the extensive and continued
 dication of the Funds which has taken place, and ad-
 ; also to the consideration of the danger of future
 if Persons maintaining one particular class of Opinions
 be entrusted with the management and entire control
 ds which are to be applied for the benefit of Persons
 ining other Opinions, that I am bound to come to the
 sion, that The Vice-Chancellor was correct in removing
 stees. After what I have already stated, it follows,
 think he was correct in the Declaration that he has

And the result, therefore, of my Judgment is this,—
 myself confirmed in the principle of it, by the learned
 near me, and coming to the further conclusions which
 stated, founded upon these principles, I think that the
 ent of The Vice-Chancellor should be affirmed. It
 a case for Costs, and I think it should be simply
 ed."

Appeal from this Decision is now pending in the House
 de.

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KERRICK v. SAFFERY.

1835 :
 20th February.

UM of Money lent by the Plaintiff, was secured
 Mortgage of an Estate for a term of Years, and
 Trust for Sale of the Fee. The Mortgagor after-
 became Bankrupt. The Bill was filed against
 his Assignees and the Trustees, and also against

*Mortgagor and
 Mortgagee.
 Bankrupt.
 Parties.*

Trust for Sale of the Fee, the Mortgagee, if he files a Bill praying
 for a Sale only, is not entitled to foreclose the Fee, nor, unless he
 amends his Bill, to foreclose the Term.

The Mortgagor, who had become Bankrupt, was held not to be
 a necessary Party to the Suit.

Where Money
 is secured by a
 Mortgage for a
 Term, and by a

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other Persons interested in the Estate, praying for Sale, but not for a Foreclosure.

Mr. *Knight* and Mr. *Bethell*, for the Plaintiff, contended that the Plaintiff was entitled to a Decree for Foreclosure of the Fee.

Mr. *Cooper*, for the Defendant, the Mortgagor, submitted that, as he had become Bankrupt, he was not a necessary Party to the Suit. *Collins v. Shirley* (a).

Mr. *Evans* for the Assignees.

Sir *W. Horne*, Mr. *Rolfe*, Mr. *C. Romilly*, Mr. *Romilly* and Mr. *Haldane* for the other Defendants.

The *Vice-Chancellor* said that, as the Bill prayed for a Sale only, the Plaintiff was not entitled to any other Relief: but that he would give the Plaintiff leave to amend his Bill for the purpose of praying for a Foreclosure of the Term; and that, when the Term was foreclosed, the Debt would be satisfied, and the Fee would be held in Trust for the Assignees of the Mortgagor.

His Honor also ruled that the Mortgagor was not a necessary Party to the Suit; as the whole of his Property was mortgaged, and, consequently, his right to redeem the Term, was vested in his Assignees.

(a) 1 Russ. & Myl. 638.

FAULKNER v. BOLTON.

1835:
16th February.

THIS was a Suit for the Redemption of a Mortgage; and a Decree had been made in the usual terms. The Defendant attended to receive the Money, at the time and place appointed by the *Master*; but the Plaintiff did not attend.

*Mortgagor and
Mortgagee.
Redemption.*

Mr. *Tennant*, for the Defendant, now moved, on notice (a), that the Bill might be Dismissed, with Costs.

If the Plaintiff in a Suit for Redemption, does not pay the Principal and Interest at the time appointed, he will not be allowed to redeem, although, before the Motion to dismiss is made, he has tendered the Amount reported due, with the subsequent Interest.

Mr. *Wigram*, for the Plaintiff, said that the Plaintiff was ready to pay the Principal, with Interest up to the present time, and asked that he might be allowed to redeem: and that it appeared, by Affidavit, that, about seven weeks after the time fixed by the *Master*, the Plaintiff had tendered, to the Defendant, the Principal and Interest up to that time, and 25 *l.* in addition.

But The *Vice-Chancellor* refused to allow the Plaintiff to redeem, and ordered the Bill to be Dismissed (b).

(a) It seems that the Motion might have been made, as of course. *Stuart v. Worrall*, 1 Bro. C. C. 581, and *Seton* on Decrees, 147.

(b) See *Novosielski v. Wakefield*, 17 Ves. 417.

1835:
11th March.

Practice.
Contempt.

A Defendant who was in contempt for want of Answer, was brought up from the King's Bench Prison, under 11 Geo. 4, and 1 Will. 4, chap. 36, rule 6, and turned over to the Fleet, and a Counsel and Solicitor were assigned him. He did not, however, put in his Answer. Held that the Bill could not be taken *Pro Confesso*, under Rule 2d, until the Defendant had been again brought up and remanded.

VISCOUNTESS BARNEWELL v. COO

ON the 26th of July 1834, the Defendant, in Contempt for want of Answer, was brought up on application of the Plaintiff, from the King's Prison, by *Habeas Corpus*, and turned over to the Fleet, and it was referred to the *Master*, under 11 Geo. 4, 1 Will. 4, chap. 36, Rule 6, to inquire whether the Defendant was unable, by reason of Poverty, to employ a Solicitor to put in his Answer. The *Master* reported in the affirmative; and, on the 9th of December, it was ordered that a Counsel and Solicitor should be assigned to the Defendant.

The Defendant not having put in his Answer,

Mr. *Willcock*, for the Plaintiff, now moved that the Bill might be taken *Pro Confesso*.

Mr. *Garratt*, for the Defendant, contended that the Defendant had not been remanded in the sense in which the term was used in the second Rule of the Act.

The VICE-CHANCELLOR :

As the Defendant was brought up under the sixth Rule, you are not at liberty, at present, to take the Bill *Pro Confesso* against him : but he must be remanded, and then you may proceed to take the Bill *Pro Confesso* under the second Rule.

THE ATTORNEY-GENERAL AT THE RELATION OF JOHN NEWELL, MINISTER OF BOOTH CHAPEL, IN THE PARISH OF HALIFAX, IN THE COUNTY OF YORK, INFORMANT, AND THE SAID JOHN NEWELL AND ROBERT MIDGLEY, MATTHEW MITCHELL AND JOHN FOULES, ON BEHALF OF THEMSELVES AND ALL OTHER THE MEMBERS OF THE SAID CHAPEL, PLAINTIFFS; AND JAMES AKED AND OTHERS, DEFENDANTS.

1835:
11th March.

*Dissenting
Meeting-house.*

The management of the Affairs of a Dissenting Chapel, was vested in the Communicants. The Congregation being dissatisfied with their Minister, held a Meeting, at which they resolved that he should be recommended to resign. Neither the Minister, nor a majority of the Communicants was present at the Meeting: but the Resolution was afterwards signed by a majority of them, and communicated to the Minister. Held that the Resolution was tantamount to a Dismissal, although it was not come to at a Meeting, at

THE Defendants were the Trustees of two Buildings, one of which was a Meeting-house for Protestant Dissenters holding the Westminster Confession of Faith and Independent Form of Church Government, and the other, a Dwelling-house for the Minister of the Meeting-house. Among Dissenters of that class, no persons are admitted to any voice or share in the management of their Affairs, either Spiritual or Temporal, but such of the Congregation as sit down at the Lord's Table, and their final determination and resolution is declared by the Opinion of the Majority of such Communicants; and, ever since the foundation and establishment of the Meeting-house in question, such had been, invariably, the custom and practice in the management of the Spiritual and Temporal matters connected therewith.

In December 1832, several of the frequenters of the Chapel being dissatisfied with *Newell's* conduct, on

which a majority of the Communicants was present.

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account of his having neglected his duty and on other grounds, a Meeting was held, at which it was unanimously resolved to address, to *Newell*, a Letter to the following effect: "Reverend Sir: We the undersigned, being Trustees, Church-members or Seat-holders now or formerly assembling at Booth Chapel, finding it utterly impossible for us to derive that Comfort and Spiritual Benefit under your Administration which we conceive the Gospel is so abundantly calculated to impart, we, therefore, most earnestly request you to take into serious consideration the importance and responsibility connected with the office you sustain and the uncomfortable state of the Church and Congregation and we most earnestly entreat you to tender in your Resignation at as early a period as you possibly can. A majority of the Communicants was not present at the Meeting; but the Letter was, afterwards, signed by majority of them. The Defendant *Calvert*, one of the Communicants, waited upon *Newell* with the Letter, after it had been so signed, and explained to him its contents but *Newell* refused to look at the Letter, and said that he would remain where he was and that it was his determination to take shelter under the Law. The Trustees then caused a Special Meeting of the Ministers and Deacons of the same denomination of Dissenters, to be summoned as an Association; and such Association was held in the Vestry of Sion Chapel, *Halifax*. *Newell* attended, the Letter was read, the number of Signatories thereto and the total number of the Members of the Congregation was stated, and the reasons why the Congregation wished *Newell* to resign were explained and *Newell* was heard in relation thereto: whereupon the Association, with the exception of two Deacons who did not vote, resolved: "That a Requisition having been presented, signed by eight Trustees, forty-

Members * and ten Seat-holders, requesting Mr. *Newell* to resign his Pastoral Charge : it is the opinion of this Meeting, in order that the Cause of the Gospel may no longer suffer injury, that Mr. *Newell* ought to resign his Charge, and that the Association recommend and advise this step only under the influence of Christian motives."

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Newell, however, still refused to resign : upon which the Trustees brought an Ejectment against him, in order to obtain possession of the Chapel and Dwelling-house. One object of the Information and Bill was to restrain that Action, on the ground that *Newell* had not been regularly dismissed from his Office.

The Injunction having been obtained,

Mr. *Jacob* and Mr. *Elmsley* now showed Cause against dissolving it. They contended that no Resolution was come to, at the first Meeting, for *dismissing Newell* from his Office, but that the Resolution was, merely, that he should be *requested* to resign : that, whatever is to be done by a Body, must be done at a *meeting* of the Body duly and properly called, and the Party to be judged ought to be cited to attend it : that a majority of the Communicants was not present at the Meeting, and that *Newell* had no notice of it. *Attorney-General v. Scott (a) ; Attorney-General v. Davy (b).*

Mr. *Knight* and Mr. *Koe* appeared for the Defendants.

* The Communicants who signed the Requisition, were more than Two-thirds of the whole number.

(a) 1 Vez. 413.

(b) Ibid. cited 419.

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The VICE-CHANCELLOR :

In my opinion, the Trustees as well as the Congregation, have behaved with great forbearance towards *Newell*. It is evident that the Conduct of that man had created very considerable dissatisfaction in the Congregation, for a long period; but no process of a hostile character were taken until December 1835. The Letter written to Mr. *Newell*, by the desire of the majority of the Members of the Congregation, suggesting that he should tender his Resignation, is, in my opinion, tantamount to a Dismissal. That Resolution, having been communicated to him, and he having refused even to look at it, a Meeting, in the nature of an ecumenical Council, was subsequently held, composed of Ministers and Deacons, at which a Resolution was passed, with almost unanimous approbation, (two dissenters only remaining neuter) that, under the circumstances of the case, Mr. *Newell* ought to resign his Office; which was only a Civil confirmation of the Resolution politely made to him by the majority of the Communicants. Though it does not precisely appear what number of Persons forming the Congregation is, it is no doubt that a majority entertained an opinion that Mr. *Newell* ought to be removed: for the Trustees in their Answer, say that a majority of the Communicants concurred in the Resolution for his removal, and that a majority was desirous that he should resign. They also state that a large majority of those present at The Lord's Table, was desirous that he should resign, and that such majority was still desirous that he should resign his Office. For my own part, I understand that the desire of the Trustees and a number of the Communicants, that Mr. *Newell* should resign, was expressed by the Letter of December 1835, in order to prevent the appearance of dealing with him as a delinquent.

or of relying too much on their own opinion, they procured the ecumenical Council to be convened, which confirmed the previous determination. Mr. *Newell* refusing quietly to acquiesce in that Resolution and quit the Chapel, an Action of Ejectment was brought, in January last, to turn him out; and I have heard no reasonable ground stated why that Action should not be suffered to proceed.

Injunction dissolved.

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EDWARDS v. JONES.

1835 :
14th and 16th
March.

Donatio ·
Mortis Causd.
Gift.
Volunteer.

THE Bill, which was filed on the 30th of May 1833, stated that *John Nathaniel Williams*, late of *Castle Hill* in the County of *Cardigan*, executed and gave to *Mary Custance* a Bond, dated the 27th of September 1819, for securing the Repayment, with Interest, of 300 l. lent to him by *Mary Custance*; and that he executed and gave her another Bond, dated the 27th of December 1828, for securing the Payment, with Interest, of 123 l. 15 s., which had become due for Arrears of Interest on the former Bond: that *Mary Custance* was Aunt to and had a great affection for the Plaintiff; and, at different times, had expressed an intention to give or leave to the Plaintiff the Money due on the Bonds; that the Bonds were fastened together by a Pin, and that

The Obligee in a Bond, gave it to her Niece, and, afterwards, in her last illness and five days before her death, signed a Memorandum, purporting to be an immediate and absolute Assignment of the Bond to her.

Held that the Transaction, could not be considered as a *Donatio Mortis Causd.*, as there was no Evidence to show at what time or under what circumstances the Bond first came into the Niece's possession, and as the Assignment was immediate and unconditional.

Equity will not assist the Donee of a Bond to recover the Amount of it, if the Gift was made without consideration.

JONES.

following effect: "That *Mary Custance*, of the County of *Cardigan*, in the County of *Cardigan*, Wales, hereby assign and transfer the within Bond of Condition, and all my Right, Title and Interest therein, and to the use of my Niece, *Esther Edwards*, of the said County of *Cardigan*, Widow, with full power and authority for the said *Esther Edwards* to sue for and recover the Amount thereof and all Interest due or hereafter to become due thereon: as witness my hand this 25th May 1830:" That *Mary Custance* immediately after signing the Memorandum, caused the Bonds to be delivered to the Plaintiff, intending that the Plaintiff should be entitled thereto and to the monies secured thereby, in case of and after her death, and expressed herself to that effect: that *Mary Custance* died on the 30th of May 1830, having made a Will, dated the 30th of May 1829, which did not revoke the Bonds or dispose of the residue of her Property: that she thereby appointed the Defendant her Executor: that the Testatrix's Personal Estate was more than sufficient to pay her Debts and Legacies: that the Bonds and the Money due thereon, were well given to the Plaintiff by the Testatrix, either as a Gift, or as a *donatio causa mortis*: that the Defendant had prevailed upon the Plaintiff to give him a new Bond for the Money secured by the two former Bonds, and had given *Williams* an Indemnity: that *Williams* died in January 1831, and appointed his Wife, *Sarah Elizabeth Williams*, executrix: and in April 1832, she paid the Amount

was entitled to the Principal and Interest due on the two first Bonds, and that the Defendant was a Trustee thereof for her, and that the Defendant might be decreed to pay to the Plaintiff what he had received from *Sarah Elizabeth Williams*.

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The Plaintiff's Witnesses proved that, at and before the time when Mrs. *Custance* signed the Indorsement, the Bonds were fastened or annexed to each other in the manner stated in the Bill, and that they had frequently heard Mrs. *Custance* say that she intended to give or leave the Money secured by the two Bonds (which she usually called The *Castle Hill* Money) to the Plaintiff.

Edward Williams, one of those Witnesses, deposed as follows: That, in May 1830, he was Clerk to *William Jones*, of *Aberystwith*, Solicitor: that, on the 24th of that month, he accompanied *William Morgan*, of *Aberystwith*, to his, *Morgan's*, house, where the Plaintiff was; and she then produced the two Bonds of September 1819 and December 1828, and showed Witness the Indorsement on the former: that such Indorsement was in the Handwriting of *George Drew*, late of *Aberystwith*, Writer: that the Plaintiff told the Witness that the Bonds had been given to her by Mrs. *Custance*, and that the Witness was requested to witness Mrs. *Custance's* Execution of the Memorandum: that the Witness showed the Bonds and Memorandum to Mr. *William Jones*, and, by *Jones's* desire, told the Plaintiff that *Jones* recommended her to have a regular Assignment of them; but the Plaintiff objected, observing that the Memorandum would do very well between Relations: that, on the same evening, the Witness went, with *William Morgan* and the Plaintiff and two other Persons, to Mrs. *Custance's* residence,

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but was unable to see her, it being late in the evening; upon which it was agreed that he should go there the following morning: that the Witness accordingly went between seven and eight o'clock in the morning, and saw Mrs. *Custance* in her own room: that the Plaintiff, and *William Morgan* and three other Persons were present: that the Plaintiff produced both the Bonds and placed them on the table before Mrs. *Custance*, and the Witness read over and explained the Memorandum to Mrs. *Custance* several times, and she appeared fully to comprehend its meaning and to approve of it, and she afterwards requested the Witness to take hold of her hand to enable her to make her Mark: that the Memorandum was, accordingly, signed by her and attested by the Witness, between seven and eight in the Morning of the 25th of May 1830, and, immediately afterwards, the Witness, at the request and in the presence of Mrs. *Custance*, delivered the Bonds to the Plaintiff; and Mrs. *Custance* said that she was giving *The Castle Hill* Money to the Plaintiff. Another of the Plaintiff's Witnesses deposed that Mrs. *Custance* had expressed a wish that her Sister, *Esther Pritchard*, who expected to succeed to part of her Property, should not know in what manner she intended to dispose of *The Castle Hill* Money, and that, a few days before her death, she desired the Witness to come to her room before *Esther Pritchard* was up, to see her sign away *The Castle Hill* Money to the Plaintiff. The Evidence of this Witness, as to what took place on the morning of the 25th of May, was to the same effect as the testimony of *E. Williams*.

The Defendant's Witnesses deposed that Mrs. *Custance* was more than 80 Years old; that she had been, for some time, afflicted with a cancer in her breast, which

caused her death; but that, when she signed the Indorsement on the Bond, her health did not appear to be worse than it had been for some time before, and that they did not expect her to die so soon as she did. They said that the Defendant procured the New Bond from *J. N. Williams*, because he could not find the two original Bonds, and, therefore, concluded that they had been lost or mislaid.

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Mr. Jacob and *Mr. Blake* for the Plaintiff:

The Transaction stated in the Bill, was a *donatio mortis causâ*. A Bond may be made the subject of such a Gift; and there can be no doubt, on the evidence, that the Bonds were delivered in contemplation of death. *Ward v. Turner (a)*. *Mrs. Custance* was, at the time, labouring under a severe illness of which she died a few days afterwards: and, although she did not express that the Bonds were to be returned in case she recovered, yet, as they were given in contemplation of death, there was an implied condition that they should be restored in that event. *Gardner v. Parker (b)*.

But, if the Transaction was not good as a *donatio mortis causâ*, it was good as an absolute Gift. The Indorsement on the Bond of 1819, though not under Seal, was an effectual Assignment; for, in order to pass Personal Property, it is not necessary that the Instrument should be under Seal. Besides, there was an actual delivery of the Bonds, which was sufficient, of itself, to pass the Property in them (c).

Mr. Knight and *Mr. G. Richards*, for the Defendant:

- (a) 2 Vez. 431. (b) 3 Madd. 184.
(c) *Duffield v. Elues*, 1 Sim. & Stu. 239; see 245.

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The Defendant's impression is that the possession of these Bonds was fraudulently obtained from *Mrs. Custance*, and that, after her death this story of Assignment was trumped up. If, however, every thing fairly took place as stated by the Plaintiff, this Story must fail.

The Bill alleges that *Mrs. Custance*, immediately after she had signed the Memorandum, delivered the Bonds or caused them to be delivered to the Plaintiff, intending that the Plaintiff should be entitled thereto and to the Monies secured thereby in case of and after *Mrs. Custance's* death. That Allegation is inconsistent with the natural interpretation of the Memorandum, which purports to be an immediate and unconditional Assignment. The difficulty with which the Plaintiff has to contend, is that there is a written record of the transaction which is inconsistent with the nature of a *donatio mortis causâ*. There is no case in which a *donatio mortis causâ* has been accompanied by a Writing. The Writing passes a present, unconditional Interest; and the Plaintiff must contradict that Writing, before she can advance one step in her Case. It appears also, from *Edward Williams's* Evidence, that the Plaintiff told him that the Bonds had been given to her. There is no Evidence to shew that the Testatrix, herself, apprehended that she was in immediate danger of dying; and the Witnesses state that, when she signed the Memorandum, she was not worse than she had been for some time previous, and that her death was a surprise upon them. *Bunn v. Markham* (d). *Walter v. Hodge* (e). *Ta v. Hilbert* (f). No reason is given why *Mrs. Custance*

(d) 7 Taunt. 224, and 2 Marsh. 532.

(e) 2 Swanst. 92.

(f) 2 Ves. jun. 111.

if she intended to give these Bonds to the Plaintiff, did not make a Codicil for that purpose.

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The Transaction was not good as a *donatio mortis causâ*; nor can effect be given to it as a Gift *inter vivos*. It is quite clear that there was no Consideration for the Assignment. The Case of *Colman v. Sarrel (g)* decides that Courts of Equity will not interfere in favour of Volunteers. The Defendant is the Executor of Mrs. *Custance*, and has got the Legal Title to the Money; and a Court of Equity will not assist the Plaintiff to displace it.

Mr. *Jacob*, in reply:

In *Tate v. Hilbert*, the subjects of the Gifts were a Cheque on a Banker, and a Promissory Note given without Consideration. The Gifts had no relation to the Donor's death; and neither the Cheque nor the Promissory Note could be made available at Law. That Case, therefore, is clearly distinguishable from the present. Then it was said that the Memorandum purports to be an immediate and unconditional Assignment: but, in *Gardner v. Parker*, the words used by the Donor were words of immediate and unconditional Gift, and yet the Gift was held to be a *donatio mortis causâ*. In *Walter v. Hodge*, the Answer and the Evidence were inconsistent with each other: the Answer represented the Gift as immediate and absolute; but the Evidence represented it as being limited to take effect in case, only, of any thing happening to the Donor, who was the Husband of the Donee. The *Master of the Rolls* thought that the Gift was not satisfactorily proved.

(g) 1 Ves. jun. 50, and 3 Bro. C. C. 12.

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The VICE-CHANCELLOR :

In this Case the Plaintiff seeks Relief with respect to a Gift, or, as she calls it, a *donatio mortis causá* of two Bonds. If the case made by the Bill were a case of mere Gift, this Court, clearly, would not interfere: though delivery of a Bond, by the Obligee, to a Third Person, would give the Bond to that Third Person, against the Obligee; yet it would not confer, on the Donee, an absolute right to recover upon the Bond. I take it to be perfectly plain that, if the Obligee in the Bond delivers it to a Stranger, and, afterwards, thinks proper to release the Obligor, the Debt will be destroyed. I admit that, if the Obligee gives the Bond to a Stranger and the Stranger chooses to destroy it, the Debt will be destroyed; for the Obligee meant to give, to the Stranger, the same dominion over the Bond that he himself had; and, as his own destruction of the Bond would be the destruction of the Debt, so the destruction by the Donee, would, equally, destroy the Debt. Again, after the Bond has been delivered, the Obligor thinks proper to pay the amount of it to the Obligee, the Donee cannot file a Bill or support an Action, against the Donor, for the amount of the Money so paid. The effect, therefore, of the Gift of the Bond, is to leave the Donee at liberty to do just so much as the law, having possession of the Bond would enable him to do; that is, he cannot sustain a Bill in Equity, against the Representative of the Obligee, for the purpose of recovering the amount: and, therefore, if the Plaintiff rest her Claim upon the Gift only, this Court would not interfere on her behalf.

The case, however, which the Plaintiff makes, is not a case of mere gift; but of a *donatio mortis causá*. The Bill represents that Mrs. Custance died in Ms

1830; and that, on or about the 25th of that month, being a few days before her death, and in her last illness, and when in expectation of death, she duly made and signed a Memorandum or Assignment, (which is, in effect, an Assignment in the most absolute and unqualified terms); that the Memorandum was indorsed upon and refers to the Bond of the 27th of September 1819; that the other Bond was usually kept with the Bond on which the Memorandum was indorsed, and attached or annexed thereto or folded up therewith; that, immediately after the Memorandum had been signed by Mrs. *Custance*, she delivered or caused to be delivered, to the Plaintiff, both the Bonds, intending that the Plaintiff should be entitled thereto and to the Monies secured thereby, in case of and after the decease of Mrs. *Custance*, and expressing herself to that or the like effect: And, upon the ground of that Transaction, the Plaintiff has filed her Bill in order to recover, the amount of the Bonds, from the Executor of the Obligee, who has received it from the Personal Representative of the Obligor.

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Now I apprehend that, for the purpose of establishing a case of *donatio mortis causá*, it is absolutely necessary to show at what time it was that the Donation itself took place. The Plaintiff represents by her Bill, in the most unequivocal terms, that, immediately after the Memorandum was signed, the Bonds were delivered to her; and, therefore, I understand her to represent that, contemporaneously with the signing of the Memorandum and on the 25th of May, the Bonds were delivered to her. The Evidence in the Case, makes no distinction between the two Bonds; and I must take it, according to the Plaintiff's own statement, that the Memorandum which, in terms, applies to that one only of the Bonds

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upon which it is indorsed, was taken and was intended by all Parties, to apply to both: and that it was so, is clear from the Evidence which Mr. *Edoard Williams* has given. He represents that the Plaintiff told him that the Bonds had been given to her by Mrs. *Custance*, and that he was requested to witness the Execution of the Memorandum by Mrs. *Custance*; that he recommended that the Bonds and the Memorandum should be shown to Mr. *William Jones* (who was the Solicitor with whom he was living as a Clerk): which the Witness accordingly did; and, by *Jones's* desire, told the Plaintiff that he, *Jones*, thought it best for her to have a regular Assignment of the Bonds; to which the Plaintiff objected, observing that the Memorandum would do very well between Relations. It is quite plain, therefore, that the Plaintiff considered the Memorandum as being as effectual for one Bond as it was for the other. But the important part of Mr. *Williams's* Evidence is that which relates to what took place, at Mrs. *Custance's* house, on the morning of the 25th of May. He says &c. &c. (see *ante*, p. 328.) The Plaintiff's own representation, then, is that, on the 24th of May, she made a statement of having the Bonds in her possession and that the Bonds had been given to her by Mrs. *Custance*. But she does not say when they were given to her; neither is there the least Evidence to show by whose direction the Memorandum was made, or when it was made; nor is there any thing stated which at all goes to show whether the Memorandum was originally written and completed with the words the "25th of May 1830" in it, or whether it was originally left with a Blank, or whether, if it were left with a Blank, the Blank was filled up on the 25th of May 1830: in short, there is not one word said about the Memorandum, except that it was in the handwriting of *Drew*. In my

opinion, therefore, the Plaintiff has, in effect, disproved, by her Evidence, the Case which she makes on the Record; because the Case upon the Record, is that the Gift was made after the Memorandum had been signed; whereas it is as plain that, the day before the Memorandum was signed—the day before any thing was executed which was, in her view at least, to have the effect of confirming it, the Gift had been made.

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No less than three Witnesses have proved that they frequently heard Mrs. *Custance* say that she intended to leave the Money secured by the Bonds, which she called "The *Castle Hill* Money," to the Plaintiff. But it is quite consistent with their having heard the old Lady say so, that she did give the Bonds to her Niece long before the 25th of May 1830: and it is of the essence of a *donatio mortis causâ*, that the Gift shall be proved to have been made in contemplation of the Donor shortly terminating life by reason of extreme sickness or extreme old age. In this Case, however, there is no evidence to show at what time the Plaintiff got possession of the Bonds. There is nothing but her own Declaration, made the day before the Memorandum was signed, that the Bonds had been given to her: and, for anything that appears to the contrary, the Bonds might have been given to her a year before.

Moreover it is settled Law that, in order to constitute a *donatio mortis causâ*, the thing must be given with the intention that, in case the Donor recover, it shall be restored to him.

In a note to the Case of *Walter v. Hodge*, the following passage is quoted from *Bracton*: "*Et est re verâ talis donatio mortis causâ, cum testator rem legatam se ipsum*

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magis habere voluerit quam eum cui legata fuerit, et cui legata est, magis quam hæredem suum." This evidently shows that, in order to constitute a *donatio mortis causâ*, the circumstances must be such as to show that the Donor intended the Gift to take effect if he should die shortly afterwards, but that, if he should recover, the thing should be restored to him. When, however, we look at the Memorandum in this Case, which was intended to have the effect of making the Plaintiff's possession of the Bonds more secure, we find that words more absolute, unqualified and unconditional could hardly have been used: and, therefore, if there had been nothing but the Memorandum in this case, it would have been totally impossible to hold that the Gift was a *donatio mortis causâ*.

Although Mrs. *Custance*, after she had signed the Memorandum, directed, as a matter of course and in order to make the Transfer perfect, that the Bonds should be delivered to the Plaintiff, yet, it appears from the statement which the Plaintiff made to *Edward Williams*, that she had got possession of the Bonds before: and, as there is no Evidence to show at what time or under what circumstances the Bonds came into her possession, the Bill cannot be supported, but must be dismissed with Costs*.

* Affirmed 1 Myl. & Craig, 226.

RDS v. THE GRAND JUNCTION RAIL-
WAY COMPANY.

1836:
22d and 25th
June.

*Agreement.
Public Policy.
Railway Act.
Corporation.*

January 1833, the Projectors of the *Grand Junction* applied, to the Trustees of the *Liverpool* Turnpike Road, for their consent to the being carried under the Road, at a place called *Quay*. In consequence of this application, a motion took place, in March, between *Thomas Case* and other Persons, on behalf of the Trustees, *John Moss*, on behalf of the Subscribers to the Bill, "as to the mode of carrying the Railway under the Road, and the Compensation for the injury which the Road would sustain, by the Railway, in the diminution of Tolls, and the prejudice consequently done to the Subscribers of the Trust." The Negotiation having been unsuccessful, the Trustees determined to oppose the Railway Bill, which had already passed the House of Commons: and, accordingly, they caused two Bills to be introduced to the House of Lords, and certain Clauses they wished to have inserted in the Bill, to be read; and they applied, to the Earl of *Derby*, to support the Petitions, and to support them with his vote. But, before the Petitions were presented, the proposed Clauses, with certain alterations, were read and adopted by *Case* on behalf of the Trustees, and by *Moss* on behalf of the Subscribers to the Bill. By one of those Clauses it was provided that the Road should be carried under the Road at *Bank* and that the Road should be carried over the Road by means of a Bridge or Viaduct, to be erected at the expense of the Company, the Roadway of which

An Agreement not to oppose a Railway Bill in Parliament, is not illegal.

The Projectors of a Railway, pending a Bill in Parliament for incorporating them, made an Agreement on behalf of the proposed Corporation, in consequence of which a threatened opposition to the Bill was withdrawn. Held that the Corporation, having received the benefit of the Agreement, were bound by it.

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 TION RAILWAY
 COMPANY.

should be as wide as the Turnpike Road then was a *Bank Quay*. After the Clauses had been agreed to, was proposed by *Moss* and consented to by *Case*, that in order to save time and expense to the Company, the insertion of them in the Bill should be dispensed with and that *Moss* should give an Undertaking that an agreement, to the effect of the Clauses, should be entered into: and, accordingly, *Moss* signed the following Memorandum at the foot of the Clauses:

"I, the undersigned *John Moss* undertake to execute an Agreement to the effect of these Clauses, so soon as the same is prepared, and to get the same confirmed under the Seal of the Company intended to be incorporated, so soon as circumstances will permit: this Agreement being made on the express understanding that there shall not be any opposition to the Bill now in Parliament, either by the Trustees of the Road from *Liverpool* to *Warrington*, or the Mortgagees of the Toll on the said Road: and this Agreement is to be void on my delivering, to the said Road Trustees or their Clerk, the engagement of the intended Company to the same effect. *John Moss, Liverpool*, 18th April 1833." Immediately below this Memorandum, *Case* wrote and signed the following words: "I recommend the Trustees to confirm the above Agreement.—*Thomas Case*."

The Agreement was afterwards confirmed by the Trustees: and, on the faith of it, they withdrew the Opposition to the Bill, which received the Royal Assent on the 6th of May 1833.

By the Act, *Moss* and the other Projectors of the Railway, and all other Persons and Bodies Politic or Corporate, who had subscribed or should thereafter subscribe to the Undertaking, and their Successors

Executors, Administrators and Assigns, were incorporated by the name of *The Grand Junction Railway Company*; and *Moss* was appointed a Director; and it was enacted that, where any Bridge should be erected for carrying any Public Road over the Railway, the Road over such Bridge, should be formed and, at all times, be continued of such width as to leave a clear and open space, between the Fences of such Road, of *not less* width than 15 feet.

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The Turnpike Road at *Bank Quay* was 50 feet wide; but, in March 1836, the Defendants began to construct a Bridge or Viaduct there for carrying the Road over the Railway, which was only 30 feet wide: and, although they were informed, by the Surveyor of the Road, that they were acting in violation of the Agreement of the 18th of April, they refused to alter their plan. Whereupon the Bill was filed, by the Trustees of the Road, on behalf of themselves and all the other persons interested in the Tolls authorized to be levied by the Act of Parliament for making the Road, praying for a Declaration that the narrowing of the Road at *Bank Quay*, was a violation of the Agreement of the 18th of April 1833, and that any departure therefrom was a Fraud upon the Plaintiffs, and that that Agreement might be declared to be binding on the Defendants; and that they might be decreed specifically to perform the same and to execute a proper Deed conformably thereto, and to restore the Road to its former condition: and that the Defendants might be restrained from proceeding with their Works at *Bank Quay*, and from making or continuing any Road there which should not leave a clear space between the Fences equal to the width of the Road there when the Act for incorporating the Company was passed, and from making any Bridge, Road or Viaduct

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contrary to or otherwise infringing the
Clauses therein referred to.

Mr. *Knight*, Mr. *Wigram* and
moved for the Injunction :

The Agreement entered into by *M*
the Defendants. He represented th
ration ; and, up to the time when
passed, he had full power to enter in
The Trustees of the Road were bou
Public : and, if they thought it nece
provisions should be made for the be
is it contrary to Public Policy that
instead of being introduced into th
made the subject of an Agreement ? T
constitute the Corporation, are prec
those on whose behalf the Agreeeme
they not then to be bound by it, m
have assumed a new character ? If tl
contrary to Public Policy or to the I
Parliament, this Court would pay no
it was for the benefit of the Public a
either with Public Policy or any exp
the general Policy of the Act. *The*
Company v. Earl Spencer (a).

Mr. *Jacob* and Mr. *Sharpe* for the

The Case of *The Vauxhall Bridg*
Spencer is entirely different from the p
would have resembled this, if *Moss* h
the Trustees, and the Railway Comp

(a) Jac. 64. Reported on the Argun
in 2 Madd. 356.

to have the Bond delivered up. Lord *Eldon* does not say, in distinct terms, that an Agreement like that in the present Case, made during the pendency of an Act of Parliament and not disclosed to the Legislature, is valid. His Lordship says that the Corporation may or may not sanction it after they have come into existence; and, if they do not, that the Individual who signed the Agreement, is alone responsible. The Principles laid down, by Sir *Thomas Plumer*, in his Judgment on the Demurrer in that case, are perfectly sound and cannot be controverted; and, whenever a case arises to which those Principles apply, it must be decided according to them.

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Moss, when he signed the Agreement, was not and could not be the Agent of the Company, as it did not exist at that time: nor indeed does he profess, by that instrument, to contract as Agent, but personally. In *Capes v. Hutton* (b), the Court refused to give effect to an Agreement entered into by a Father on behalf of his Son, who was in existence, but was incapable, by reason of his Infancy, of entering into a binding Contract. Even if the Company had been in existence, they would not have been bound by the Agreement; for a Corporation cannot be bound except by an instrument under their Common Seal (c).

If this Agreement were supported, a Fraud would be committed on the Public: for persons who purchase Shares in a Company, look only to the Act of Parliament by which the Company is constituted. They have no means of ascertaining what private Agreements

(b) 2 Russ. 357.

(c) See *Carter v. The Dean and Chapter of Ely*, ante, p. 211.

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COMPANY.

the Company may have entered into: and, if effect is given to this Agreement other Agreements may be brought forward, which would defeat the whole effect of the Act. The Legislature has declared that it is sufficient if the Bridges over which Roads are to be carried, are 15 feet wide; and yet the Court is called upon to declare that the Bridge, in this case, shall be 50 feet wide: so that the Legislature has decided differently from what this Court is called upon to decide.

If the Plaintiffs have any Remedy under this Agreement, their Remedy is against *Moss* only*.

The *Vice-Chancellor*, after observing on those Facts in the Case from which it had been argued that the Agreement entered into by *Moss*, was not final, concluded his Remarks on that subject, by saying that, as the Opposition to the Bill was withdrawn in consequence of that Agreement, the Company had had the benefit of it, and, therefore, it must be considered as binding on them. His *Honor* then continued as follows:

When Parties are going before Parliament for the purpose of being incorporated for private purposes, though, in some degree, for the benefit of the Public, a door would be open to Fraud if Agreements made by their Agents when they are in their Individual Capacities, should not be binding on them when they have become a Body Corporate, and, more especially, when they have

* Another question arose, whether the Agreement was final: but as that question depended on Facts, it was thought unnecessary to notice it in the Report.

obtained that character by means of those Agreements. There is nothing, in point of Law, objectionable in the Agreement in this Case: and the Opinion expressed by Lord *Eldon*, in *The Vauxhall Company v. Earl Spencer (d)*, sufficiently shows that such Agreements are not a Fraud upon the Legislature or contrary to Public Policy*.

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v.
GRAND JUNCTION RAILWAY
COMPANY.

Injunction granted.

(d) See Jac. 68.

* Affirmed by The Lord Chancellor. See 1 Myl. & Craig, 650.

ARNOLD v. HARDWICK.

1835:
14th March.
Appointment.

SAMUEL JAMES ARNOLD, the Father of the Plaintiffs, being, under the Will of *Walter Pye*, Esq., entitled to a Sum of Stock for his life, and having power to appoint it, subject to his Life Interest, amongst his Children, made an appointment of part of the Fund, and assigned his Life Interest therein, to two of his Sons. The Defendants (who were the Trustees of the Stock) having reason to think that the appointment had been made under an understanding, between the Father and his Sons, that the latter should lend the Proceeds of the Sum appointed, to the former, but on good Security, refused to transfer that Sum to the Plaintiffs; upon which the Bill was filed, by the Appointees, praying that the Defendants might be decreed to make the Transfer.

If the Donee of a Power appoints the Fund to one of the objects of the Power, under an understanding that the latter is to lend the Fund to the former, although on good Security, the Appointment is bad.

1835.

ARNOLD

v.

HARDWICK.

The Answer stated the grounds upon which the suspicions of the Defendants as to the intended Loan, were founded.

Mr. *Barber* and Mr. *Ayrton* for the Plaintiffs.

Mr. *Turner* for the Defendants.

The *Vice-Chancellor* said that, if there was any antecedent Bargain between the Father and his Sons, that if the Appointment were made, the Fund should be lent to the Father, the Appointment would not be good; and that the question was whether, in consequence of what was stated in the Answer, the Trustees ought to be directed to transfer the Fund without further inquiry.

Mr. *Turner* then said that the Persons entitled to the Fund in default of Appointment, ought to be made Parties to the Suit: and His *Honor* being of that opinion, the Cause was ordered to stand over in order that they might be made Parties.

In the course of the Argument *Macqueen v. Farquhar* (a) and *Farmer v. Martin* (b) were referred to.

(a) 11 Ves. 467.

(b) *Ante*, vol. ii, page 502.

BURGESSSES OF THE CORPORATION OR
TOWN AGENT OF RUTHIN, IN THE COUNTY
OF DENBIGH, v. ADAMS.

1835:
27th March and
23d April.

Solicitor.
Costs.

by the Defendant, that the Bill might be
e File, for irregularity, on the ground that
s assumed to sue in a Corporate character
ey were not entitled; and that the Costs
the Defendant, in appearing to and taking an
of the Bill, might be paid by *Williams*, the
to the Solicitor for the Plaintiffs.

If a Bill is or-
dered to be
taken off the
File on the
ground that the
Plaintiffs as-
sume to sue in
a Corporate cha-
racter to which
they are not en-
titled, the Costs
will be ordered
to be paid by
the Town Agent
of the Plaintiffs,
and not by their
Solicitor in the
Country.

tion was whether the Costs ought to be
: Town Agent or by the Solicitor in the

Chancellor directed the following Issue to
Whether there was any Corporation known
e of the Burgesses of the Corporation or
Ruthin in the County of *Denbigh*, with
dorse any Special Matter on the Postea, as
of Incorporation (if any) or otherwise; and
s should be Plaintiff, and *Adams* Defendant

His *Honor* added that if, on the trial of
should be found that there was no such
he should hold *Williams* responsible for

it and Mr. *Booth*, for the Motion.

le, Mr. *Koe* and Mr. *J. Jervis*, for the

rsley, for *Williams*.

MEMORANDUM.

THE Reporter has been informed that the Note in page 124 *ante*, is incorrect in stating that Mr. *W. Russell* claimed precedence over the King's Counsel, he having claimed it over Mr. *Cooper* only.

The Claim, however, was resisted by Sir *E. Sugden*, on behalf of the Bar. Must not, therefore, Sir *E. Sugden* have thought that Mr. *W. Russell* might, on the same ground, have claimed precedence over the King's Counsel?

ASES IN CHANCERY,

BEFORE THE

VICE-CHANCELLOR.

PEACE v. HODGSON.

On the 15th of January 1835, which was two days more than the six days mentioned in the 5th of Lord *Lyndhurst's* Orders would have expired, the Plaintiff obtained an Order for referring the Answer for insufficiency; he did not, however, serve the Order until the 15th of January. That Order was afterwards discharged, on the ground that it ought to have been served within six days.

Mr. *Jacob*, for the Plaintiff, now moved to discharge the Order by which the Order of reference had been discharged.

By the 5th of Lord *Lyndhurst's* Orders, the Plaintiff was, first, eight days and then six, for referring an Answer for insufficiency; and, by the 12th Order, he has fourteen days more for obtaining the *Master's* Report. We were bound to refer the Answer on or before the 15th of January, and we did refer it by the Order obtained on the 15th. There was no necessity to serve

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1835:
27th March.

*New Orders.
Insufficiency.
Practice.*

An Order for referring an Answer for insufficiency, must be served as well as obtained before the expiration of the six days allowed by the 5th of Lord *Lyndhurst's* Orders.

1835.

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that Order within the six days. It is true that we could not have acted on it until it had been served : but, when it was served, it operated retrospectively. There is no pretence for saying that the Order was abandoned because it was not served within the six days. The decree was prejudicial to the Party who obtained the Order, and, as it was regularly obtained, it ought not to have been discharged. *Lorimer v. Lorimer (a), Young Smith (b)*.

Mr. Knight, for the Defendant.

The VICE-CHANCELLOR :

There was no Order of reference which could have been acted on within the six days ; and, therefore, the Plaintiff did not refer the Answer within the six days, as, by the Terms of the 5th Order, he ought to have done.

Motion refused.

(a) 1 Jac. & Walk. 284.

(b) 3 Madd. 196.

TUCKER v. WILKINS.

1835 :
17th March.

hearing of this Cause for further directions *,
h of July 1833, the Defendants were decreed
for and pay to the Plaintiff the value of cer-
s, and also the Costs of the Suit.

Revivor.
Costs.

intiff's Solicitor intended to proceed, forth-
ix the Costs, but, at the request of the Soli-
he Defendants, he consented, from time to
postpone the Taxation, under an Undertak-
e part of the latter, that such Postponement
: prejudice the Plaintiff's Claims, in case of
of either Party before the Taxation should
ted.

The Plaintiff's
Solicitor, at the
request of the
Defendants'
Solicitor, agreed
to postpone the
Taxation of
Costs decreed
to be paid to
the Plaintiff,
on an Under-
taking that
the Plaintiff
should not be
prejudiced
thereby.
Before the
Costs were
taxed, the
Plaintiff died.
Held that his
Executors were
entitled to re-
vive the Suit
for the Costs.

ration was commenced in December 1833, and
ged that, in March 1834, the Amount of Costs
he Plaintiff was entitled, was settled at 895 *l.*
e the *Master* made his Certificate, the Plaintiff
July 1834, his Executors filed a Bill of Revivor
lement, stating the Facts before mentioned,
ig that the Suit and Proceedings might be
nd that the Plaintiffs might have the benefit
nd that the Defendants might be ordered to
5 *l.* to them, and that, if necessary and proper,
r might make or be at liberty to make his
nunc pro tunc, and date it before the death of
ed Plaintiff.

Report of the original Hearing, *ante*, Vol. IV.

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TUCKER
v.
WILKINS.

The Defendants, to so much of the Bill as revived the Original Suit and the Proceedings therein revived, pleaded Agreements made between the deceased Plaintiff, dated in November 1791, in which the Deceased agreed to accept certain satisfaction of the Tithes due from the Defendants, that they had paid those Sums accordingly; and answered as to the rest of the Bill.

Mr. *Barber*, Mr. *Kindersley* and Mr. *Stirling*
in support of the Plea :

The question is, simply, whether the Suit revived for Costs.

Where, as in this Case, the purposes of the Statute have been satisfied, there can be no revivor for Costs. The Answer denies that the Amount of Costs to be paid to the Plaintiff, was settled at 895 *l.*, or that the Defendant had proceeded so far as to ascertain what Sum Total of Costs to which he was entitled. If there has been a new Agreement for Costs, the Plaintiffs have a right to enforce it by filing a Supplemental Bill, but they have no right to file a Bill of Revivor. If the whole of the Allegation as to the Agreements be false; and so the rule of the Court that there shall be no revivor for Costs, might be evaded by stating a nonexisting Agreement. *Hall v. St. John*, *Jenour v. Jenour* (b), *Lowten v. The Corporation of Colchester* (c), *Morgan v. Scudamore* (d), *Geering* (e).

(a) 1 Bro. C. C. 438.

(b) 10 Ves. 562.

(c) 2 Mer. 113.

(d) 2 Ves. jun. 3

3 Ibid. 195.

(e) 5 Madd. 375.

CASES IN CHANCERY.

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e Vice-Chancellor: The Bill asks that the *Master* be ordered to make his Certificate, as to the Costs, *pro tunc*, and date it before the death of the *ff* in the Original Suit: how can that be done if the Suit is revived? You have not pleaded to *rt* of the Prayer. By your plea you say that the *ght* not to be revived: why then do you answer that which cannot be done unless the Suit is *?*]

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TUCKER
v.
WILKINS.

Prayer for that Order does not belong to the Bill *revivor*, but is grounded on the Supplemental Matter: had I pleaded to it, we should have pleaded to part *relief* which the Plaintiffs might have had at the *of* the Supplemental Suit. The Plea is confined *right* to revive, and does not extend to that which *part* of the Prayer in a Bill of Revivor, but is *consequence* of the right to revive.

Knight, Mr. Jacob and Mr. Blake appeared in *of* the Bill.

The *Vice-Chancellor*, without hearing them, said: *lea* is to so much of the Bill as prays that the *l* Suit and the Proceedings therein may be *re-* and, therefore, the Defendants ought not to have *d* to that part of the Bill which prays that The *may* make his Report or Certificate *nunc pro* *id* date it before the death of the Plaintiff in the *l* Suit: for The *Master* cannot make his Report *re* it before the death of the Plaintiff, without *a* Report in an abated Suit; which cannot be *or* no proceeding can be taken in that Suit until *vived*. The Plea professes to extend to every *ing* in the Original Suit; but, at the same time,

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TUCKER

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the Defendants have answered as to a particular proceeding in that Suit.

Besides, what is stated to have taken place between the Parties, amounts, in effect, to an Agreement that the Suit should be revived. On both grounds, therefore, the Plea is bad.

1835:
23d March.

Will.

Construction.
Uncertainty.
Remoteness.

ELLIS v. SELBY.

PETER RICHARD LAHY, by his Will, dated the 10th of June 1815, gave 600*l.* Bank Stock, to Messrs. *Wright, Selby and Robinson*, upon Trust to pay the Dividends to *Frances Bennett* for her life: and he gave Legacies of 50*l.* each, to *Wright, Selby and Robinson*: and to *William Richard Ellis* (who was an illegitimate child) all his Freehold Messuages or Tenements, with the Appurtenances, situate at *Arundell* and in *Great Ormond-street* in the County of *Middlesex*, for his life, with Remainders to his first and other Sons successively in Tail Male, with Remainder to *Wright, Selby and Robinson* in Fee, upon the Trusts after mentioned. The Testator also gave to them all his Stock or Funded

Testator gave his Bank Stock to Trustees, in Trust for *F. B.* for life, and his Funded Property to the same Trustees, in Trust for *W. R. E.* for life, and, after his death, in Trust for his Issue; and

he directed the Trustees, after the decease of *F. B.*, to pay the Dividends of his Bank Stock to *W. R. E.* for life, and, after his decease, to apply the Dividends and Capital for the benefit of the Children or Child of *W. R. E.*, in such manner as he had directed respecting his Funded Property; and, should *W. R. E.* die without Issue Male or Female of his Body lawfully begotten, then he directed the Trustees to apply his Funded Property and Bank Stock, for such Charitable or other purposes as they should think fit, without being accountable to any person; and he gave the Residue of his Personal Estate and Effects, Wines, Pictures, Plate, Books and Furniture, to *W. R. E.* Held that the ultimate Trust of the Funded Property and Bank Stock, was not too remote, but was void for uncertainty; and that the Residuary Clause was general.

in the Four per Cents. and other Public Funds, to pay the Dividends to *Ellis*, during his life and after his decease: "Then upon Trust that the said *William Richard Ellis* have Issue of lawfully begotten, whether Male or Female) I appropriate, the Interest and Dividends of my said Property, for and towards the Maintenance and Education of such Issue, if more than one, share alike, and if only one, to and for the Maintenance of such only one, during his, her or their Nonage, until they attaining respectively the age or ages aforesaid, to transfer or make over to them, if more than one, in equal Shares, Parts and Proportions, and if only one, to and for the said one only, the whole of the said Funded Property. And my Will is that after the decease of the said *Frances Benson* I have left and bequeathed the Dividends and Profits of my Bank Stock during her life, my said Will do pay the Dividends and Profits thereof, as and when they shall become due, unto the said *William Richard Ellis*, for and during the term of his natural life, from and after his decease, do pay and appropriate the Dividends thereof and also the whole of the said Stock, to and for the Benefit and Advantage of such Children or Child, if only one, of the said *William Richard Ellis*, in such manner as I have herebefore directed and intended respecting my Stock or Property: And I do hereby will, declare and intend, that if the said *William Richard Ellis* should die without Issue Male of his Body lawfully begotten, then and in such case the Trusts respecting the said Freehold Property are to be, that my said Will do sell and dispose of the same for the best Advantage of the said Issue that can be reasonably got or obtained

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ELLIS
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for the same, and do pay, thereout, to *Martin Butler*, &c., the Legacies or Sums of 100 l. to each of them, and that my said Trustees do retain to themselves the further Legacy or Sum of 100 l. to each of them; and that my said Trustees do retain to themselves what shall remain in hand from the produce of the Sale of my said Freehold Property after payment of the said last-mentioned Legacies, upon Trust to pay, apply and distribute the same to and for such Charitable or other purposes as my said Trustees and the Survivors and Survivor of them, his Executors or Administrators, shall think fit, without being answerable or accountable to any person or persons whomsoever for such their Disposition thereof. And should the said *William Richard Ellis* die without Issue Male or Female of his Body lawfully begotten, then and in such case my Will is that my said Trustees do pay or cause or secure to be paid, to the said *Frances Bennett*, from and out of the Dividends of my said Funded Property, one Annuity or further annual Sum of 40 l., during the term of her natural life, and, subject to such Annuity, that my said Trustees do pay and apply the whole of my said Funded Property, both Stock and Dividends due or to become due thereon, and also my said Bank Stock from and after the decease of the said *Frances Bennett*, to and for such Charitable or other purposes as they, my said Trustees and the Survivors or Survivor of them, his Executors or Administrators, shall think fit, without being accountable to any person or persons whomsoever for such their Disposition thereof: And as to all the Rest and Residue of my Personal Estate and Effects, Wines, Pictures, Plate, Books and Furniture of every description in my House at *Arundel*, I give and bequeath the same to the said *William Richard Ellis*, his Executors, Administrators

signs for ever. And I hereby appoint the said right, *N. T. Selby* and *H. Robinson* Executors of my Will."

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a Codicil, dated the 29th of July 1818, after that *Wright* had died, the Testator appointed *Holmes* to be one of his Executors, conjointly *Selby* and *Robinson*; and he delegated to, and *Holmes*, conjointly with them, with the like and Powers as were given, by his Will, to *Wright*, and *Robinson*; and he gave *Holmes* a Legacy of and also an eventual Legacy of 100 *l.*, in like manner, he had, by his Will, given similar Legacies to his executors.

a second Codicil, dated the 16th of November the Testator confirmed his Will and first Codicil, gave to *Holmes*, his Heirs, Executors, &c., jointly *Selby* and *Robinson*, their Heirs, Executors, &c., power, authority, and interest in, over and upon the real Estates and Effects in his Will given to *Wright* with *Selby* and *Robinson*, in the same manner for the same purposes as if *Holmes's* name had been inserted in the Will in the place of *Wright's*.

The Testator died in May 1831.

She died on the 23d of September 1831, without having, by his Will dated the 22d of September given all his Property and Effects to the Plaintiff's Widow, and appointed her his Executrix.

The Bill prayed that it might be declared that the Testator's Intent and Direction in the Will of *P. R. Lahy*, that, *Ellis* die without Issue of his Body, the Trustees

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should pay and apply the whole of *Lakey's* Funded Property, both Stock and Dividends, and also his Be Stock, to and for such Charitable or other purposes they in their discretion should think fit, was too remote or too indefinite to be carried into effect, and was, therefore, void, and that all the said Stock and Dividends were undisposed of and fell into the Residue of *Lakey's* Personal Estate, and that the Plaintiff was entitled to such Residue.

Mr. Knight, Mr. Rolfe and Mr. Wyatt, for the Plaintiff:

The Bequest over of the Funded Property and Be Stock, is void on two grounds: first, it is too remote: *Barlow v. Salter* (a); secondly, it is uncertain. *Morley v. The Bishop of Durham* (b), *James v. Allen* (c), *Ommaney v. Butcher* (d), *Fowler v. Garlike* (e). There is another case which is decisive of the present question: *Vezey v. Jamson* (f). There the Trust was to pay and apply, the unappointed part of the Residue, or towards such Charitable or Public purposes as the Laws of the Land would admit of, or to any persons or persons and in such shares and proportions, parts, manner and form as the Executors should, in their discretion, will and pleasure, think fit, and as they should think would have been agreeable to the Testator if he had been living, and as the Laws of the Land did not prohibit: and Sir John Leach says: "It is, in effect, a Gift in Trust, to be absolutely disposed of in any manner that the Trustees think fit, which is consistent with the Laws of the Land, and so that it be not applied to

(a) 17 Ves. 479.

(b) 9 Ves. 399.

(c) 3 Mer. 17.

(d) Turn. & Russ. 260.

(e) 1 Russ. & Myl. 232.

(f) 1 Sim. & Stu. 69.

use and benefit. The Testator has not fixed, part of this Property, a Trust for a Charitable I cannot, therefore, devote any part of it to he has given it to the Trustees, expressly upon l they cannot, therefore, hold it for their own The necessary consequence is that the pur- ue Trust being so general and undefined that t be executed by this Court, they must fail , and the Next of Kin become entitled to the ,

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case the Next of Kin of the Testator are question. The Bequest over having failed, d Property and the Bank Stock, subject to ett's Life-interest, fall into the Residue, and the Plaintiff, who is the Personal Representa- residuary Legatee of *Ellis*. It is quite clear rustees do not take it beneficially: *Morice v. p of Durham* decides that.

Wray, for the Crown :

quest over of the Funded Property and Bank not too remote: for it is clear, from the con- e Will, that, when the Testator used the ex- "die without Issue Male or Female of his rfully begotten," he meant: "die without of his Body lawfully begotten."

xt question is whether the Bequest over to e or other purposes, is void for uncertainty. Testator points out two Objects, one of which and the other is not, the Court will not reject , but will give effect to that which is defined equently, the Bequest over to Charitable pur- good.

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Supposing, however, the Bequest over to be wholly void, then the question is whether the Funded Property and Bank Stock pass by the Residuary Clause, or whether that Clause carries anything more than the Wines, Pictures, Plate, &c., and other articles *ejusdem generis*. If, as I submit, the Clause is confined to the Articles specified and others *ejusdem generis*, then the Funded Property and Bank Stock are undisposed of, and, as there are no Next of Kin of *Ellis*, the Crown will be entitled to it. It is quite clear that the Executors and Trustees cannot retain it: for it is given to them as Trustees, and they have equal Legacies given to them *Middleton v. Spicer (g)*.

Sir William Horne and Mr. Blunt for the Defendant *Holmes*:

The Bequest over is not too remote. The Testator directs his Trustees to pay the Dividends of his Funded Property, to *W. R. Ellis* during his life; and, then he directs them, *from and after his decease*, (should the said *W. R. Ellis* have Issue of his Body lawfully begotten, *whether Male or Female*), to apply the Dividends for their Maintenance and Education; and, shortly afterwards, he mentions the same class of persons as the *Children or Child* of *W. R. Ellis*. It is plain, therefore, that when the Testator says: "should the said *W. R. Ellis* die without Issue Male or Female of his Body lawfully begotten," he means: "should the said *W. R. Ellis* die without having a Child living at his death."

[The Vice-Chancellor:—When you look at the words used by the Testator in disposing of the Reversion of

the Bank Stock, in the preceding part of his Will, there can be no doubt that he has put his own interpretation on the words, " Issue Male or Female," in the gift over; and that he meant " Child or Children."]

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Secondly: It was not the Testator's intention to devote his Funded Property to Charity, absolutely and in all events; but, if any person should dispute the validity of his Will in that respect, then that his Trustees should become the owners of the Property, to all intents and purposes. In *Morice v. The Bishop of Durham* the Property was to be disposed of to objects of benevolence and liberality, and, in *Vezey v. Jamson*, to Charitable or Public purposes: so that there could be no doubt that, in both those Cases, the beneficial enjoyment of the Property by the Trustees, was excluded. Here, however, the Testator has directed his Trustees to apply, the whole of his Funded Property and Bank Stock, for such Charitable or other purposes as they should think fit, and without being accountable to any person or persons whomsoever for their disposition thereof: he has, therefore, given them the absolute and irresponsible power of disposing of the Property, and, consequently, the beneficial ownership of it.

The Case of *Gibbs v. Rumsey* (h), is a very important authority in our favour. There the Bequest was: "Unto my said Trustees and Executors (the said *H. Rumsey* and *J. Rumsey*) to be disposed of unto such person and persons, and in such manner and form, and in such Sum and Sums of Money as they, in their discretion, shall think proper and expedient." Sir *W. Grant*, M. R. says: "I see nothing here but a purely arbitrary

(h) 2 V. & B. 294.

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power of Disposition according to a Discretion which the Court can either direct or control. It is said, the Testatrix meant the Executors to give this Property to somebody, and not to enjoy it themselves: but that might be said in every case of a Bequest to give to objects not distinctly specified." And His Honor held that the Executors took an absolute beneficial Interest in the Property.

Supposing, however, that the Court should think that the Property in question ought to be applied to Charitable purposes, the Court will not interfere with the distribution of the Property; but will leave the Trustees at liberty to apply it to such Charities as they may think proper; as was done in *Waldo v. Caley* (i), *Horde v. The Earl of Suffolk* (k), and *Bennett v. Honywood* (l).

Mr. Skirrow and Mr. Lynch for the Defendants,
Robinson and Selby:

The Court having expressed an opinion that the Bequest over of the Funded Property and Bank Stock, is not too remote, the only question is whether it is void for uncertainty. We submit that there is an alternative, but no uncertainty: and this Case differs from the Cases cited in this, that the alternative is clear. In the first instance, this Bequest is impressed with the character of Charity; but, if the Property could not be legally applied for Charitable purposes (as to which the Testator seems to have entertained a doubt) then he gives it to his Trustees to be used and applied according to their discretion. In *Mills v. Farmer* (m) Lord Eldon deci-

(i) 16 Ves. 206.

(l) Amb. 708.

(k) 2 Myl. & Keen, 59.

(m) 19 Ves. 483.

ded that, where a Testator gives Property to Charity, generally, without specifying any particular Charity, the Court will direct a Scheme to be laid before the *Master*. In *Pieschel v. Paris* (*n*), where a Testator specified certain Charities, but left Blanks for others, the Court did not hold that the Bequest was void, but referred it to The *Master* to approve of a Scheme. The Cases of *Johnston v. Swann* (*o*), and *Jemmit v. Verri* (*p*), are to the same effect. In *Morice v. The Bishop of Durham*, the word *Charity* did not occur. In *Vezey v. Jamson*, the Residuary Estate was directed to be applied not only to such Charitable or Public purposes, but to any person or persons &c.; so that there clearly was uncertainty in that Case. In *Fowler v. Garlike*, no Charitable purpose was expressed.

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The Case of *Gibbs v. Rumsey* is an authority that there is no uncertainty in the second alternative of the Bequest. In that Case, Sir *W. Grant* says: "Supposing this Testatrix, after this Gift to the Executors, had requested them to give the Residue to such persons and in such manner as they may think proper and expedient; there would have been no Trust, notwithstanding the words, on account of the uncertainty of the object. It is said the Testatrix meant the Executors to give this Property to somebody, and not to enjoy it themselves: but that might be said in every case of a Bequest to give to objects not distinctly specified, and in every case of a general power of appointment." Here, too, the Trustees are not to be accountable to any person for their disposition of the Fund. Those words are not found in any of the Cases that have been cited.

(*n*) 2 Sim. & Stu. 384.

(*o*) Amb. 585; Blunt's Edit. note 4.

(*p*) Ibid.

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The VICE-CHANCELLOR :

I do not think it necessary, *Mr. Knight*, to trouble you to reply.

With respect to the Surplus of the Fund produced by the sale of the Real Estate, no question is made. That would go, as a matter of course, to the Heir-at-Law, if there be one.

Then, as to the Personal Estate. I have before expressed my Opinion upon the words: "die without Issue Male or Female." They must mean die without having Children. The Testator has put his own construction of those words: for he says that, after the death of *Frances Bennett*, his Bank Stock is to go: "to and for the benefit and advantage of the lawful Children, or Child if only one, of the said *William Richard Ellis*, in such manner as I have hereinbefore willed and directed respecting my Stock or Funded Property in the Four per Cent. Consols, Three per Cent. Consols, Three per Cent. Reduced, and Five per Cent. Bank Annuities." He had no otherwise given his Stock in those Funds than to the Issue Male or Female of *W. R. Ellis*. That point, therefore, is quite clear.

Then with respect to the disposition of the Funded Property and Bank Stock.—The Testator, after having given it to *W. R. Ellis* for life, and, afterwards, to his Children, says: "and should the said *William Richard Ellis* die without Issue Male or Female of his Body lawfully begotten, then and in such case my Will is that my said Trustees do pay or cause to be paid, to the said *Frances Bennett*, from and out of the Dividends of my said Funded Property, one Annuity or further annual Sum of 40 *l.*, during the term of her natural life: and,

subject to such Annuity, that my said Trustees do pay and apply the whole of my said Funded Property, both Stock and Dividends due or to become due thereon, and also my said Bank Stock from and after the decease of the said *Frances Bennett*, to and for such Charitable or other purposes as they, my said Trustees, and the Survivors and Survivor of them, his Executors or Administrators, shall think fit, without being accountable to any person or persons whomsoever for such their Disposition thereof." I admit that, if it could be collected upon the whole, that nothing else was meant than Charity, the Bequest would be perfectly good. It would fall within the Cases of *Waldo v. Caley* and *Horde v. The Earl of Suffolk*. But, in those Cases, nothing else was pointed at but Charity. The only Question was, whether it was Charity of a Public nature or Charity of a Private nature; but it was taken to be clear that Charity of some sort was intended: and what the Court decided, in those Cases, was that, being Charity, and having regard to the ample discretionary Powers given to the Legatees, and to the smallness of the Fund, it was not desirable to direct any Scheme to be prepared, although Charity was clearly intended.

Here the Testator has expressly drawn a distinction between Charitable purposes and other purposes; and I must, therefore, take it that he meant either Charitable purposes, or purposes not Charitable; but whether the purposes not Charitable were to be purposes which might give a beneficial Interest to the Trustees, or some other purposes, the Testator has no where made clear. It is uncertain whether the Trust was to be for Charitable purposes or for purposes not Charitable. Then it is nothing more than if he had given an Estate to *A.* or to *B.*, which would be void; and my Opinion is that the

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Gift of this Portion of the Personal Estate, is void for uncertainty.

I also think that it must, of necessity, fall into the Residue; because the Testator, after disposing of certain parts of his Property and declaring his Intention as to his Stock or Funded Property, says: "And as to all the Rest and Residue of my Personal Estates and Effects, Wines, Pictures, Plate, Books, and Furniture of every description in my House at *Arundel*, I give and bequeath the same to the said *W. R. Ellis*, his Executors, Administrators and Assigns for ever." It appears to me that he intended, by this Clause, to make a complete Disposition of the Residue of his Estate; and, consequently, whatever portion of his Personal Estate was not completely and effectually disposed of by the prior part of his Will, would, by operation of Law, constitute a part of the Residue given to *W. R. Ellis*.

I am of Opinion that the Plaintiff who claims under *W. R. Ellis*, is entitled to the Bank Stock and Funded Property, subject to the Life-interest and Annuity given to *Mrs. Bennett*.*

(a) Affirmed by The Lord Chancellor. See 1 Myl. & Craig 286.

FRISBY v. STAFFORD.

THE Plaintiff had obtained the usual Four-day Order, on the *Master's* Certificate that the Defendant had not put in his Examination. The Certificate was filed within four days after the Signing of it, as directed by the Order of 1692 (a); but not until the day after the Four-day Order was obtained. The Defendant still being in default, the Plaintiff obtained, first, an Order for a Sergeant-at-Arms, and, afterwards, an Order for a Sequestration.

Mr. *Kindersley*, for the Defendant, now moved to discharge the three Orders for irregularity, on the ground that the Certificate was not filed when the Four-day Order was obtained. He referred to the Order of 1692, and to *Eyles v. Ward* (b), *Wynne v. Jackson* (c), *Rush-ton v. Troughton* (d), and *Harris v. Cotter* (e), and said that, the first Order being irregular, all the subsequent ones were invalid.

Mr. *Knight*, for the Plaintiff:

The Reports and Certificates mentioned in the Order of 1692, are judicial Proceedings of the *Master*. A Certificate that no Examination has been filed, is not a judicial Proceeding: it is only a Certificate that the Defendant has not done what he has been ordered to do, and is, in fact, merely Evidence that the Examination is not in the Office. There is this peculiarity with respect to the Four-day Order: it is made on reading the Certi-

1835:
28th March.

Practice.
Four-day Order.
Certificate.

The Four-day Order, if obtained before the filing of the Certificate that the Defendant has made default in putting in his Examination, is irregular.

- | | |
|--------------------------|-----------------------------------|
| (a) See Beames's Orders, | (c) 2 Sim. & Stu. 226. |
| 292. | (d) <i>Ante</i> , Vol. II. p. 33. |
| (b) 2 P. W. 517. | (e) 1 Myl & Keen, 568. |

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v.
STAFFORD.

ificate itself, and not an Office Copy. The Certificate must be dated on the day on which the Motion is made, and, if it is to be filed on the same day, Parties applying for the Order would be continually baffled. It is sufficient if the Certificate is filed within four days from its date. Before the Order was drawn up, the Plaintiff filed the Certificate and took an Office Copy of it. If the Order for the Serjeant-at-Arms had been obtained before the Certificate was filed, it might have been void; but as that Order was not obtained until some weeks afterwards, no proceeding was taken under the Certificate until it had been filed.

The VICE-CHANCELLOR :

The object of the Order of 1692, is sufficiently explained by the Language of it. [*His Honor here read the Order.*] So that the object of this Order was to prevent any Order being made, or any proceeding being taken on a Report or Certificate before it has been filed; and it provides that all Reports or Certificates shall be filed within four days after the making and signing thereof. In *Eyles v. Ward*, the Report was not filed within the four days; but it was filed before any proceeding was taken upon it; and, therefore, the substance of the Order was complied with. Mr. *Knight* has said that the Certificate, in the present Case, is not a judicial Proceeding, but, merely, Evidence that the Defendant has not done what he was ordered to do. The Order of 1692, however, contemplates all Contempts, Orders, Decrees and other Proceedings grounded on Reports of the *Masters* of this Court; and, therefore, it has involved in the same circumstances both Orders and Proceedings: and it seems to me that what was done in *Wynne v. Jackson*, and *Rushton v. Troughton*, shows that a Report is considered of no avail until it is filed. The

consequence is that the Order first obtained in this Case, was wrong: and, if the first Order fails, all the subsequent Orders must also fail.

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STAFFORD.

WALKER v. CHRISTIAN.

1835:
2d April.

Jurisdiction.

THE Plaintiffs, who were Merchants in India, having had dealings with the Defendant, in the course of which he became indebted to them, caused him to be arrested for the Debt, in this Country. The Writ was afterwards discharged, on account of an Informality in the Title to the Affidavit verifying the Signature of the Judge in India to the Affidavit of Debt made by the Plaintiffs. The Bill in this Cause was then filed for an Account of the Dealings and Transactions between the Plaintiffs and the Defendant, and a Writ of *Ne exeat* was issued, under which the Defendant was taken into custody. That Writ was afterwards discharged, because the Plaintiffs were resident out of the Jurisdiction. After the Order for discharging it had been made, but before the Defendant had been set at liberty, the Plaintiffs, who had obtained a new Writ at Common Law, again arrested the Defendant for the same Debt. The Defendant took out a Summons for the Plaintiffs or their Attornies to show Cause, before Mr. Justice *Bosanquet*, why he should not be discharged from this Second Arrest; and, pending that Proceeding, he moved, in this Court, that the Plaintiffs, their Attornies or Agents might be Ordered to discharge him.

The Defendant had been taken under a *Ne exeat*, which, afterwards, was ordered to be discharged. After the Order was made but before the Defendant was set at liberty, the Plaintiffs arrested him at Law, for the same cause of Suit. The *Vice-Chancellor* was of Opinion that he had no jurisdiction to discharge the Defendant from the Arrest.

Mr. *Knight* and Mr. *Turner*, in support of the Motion, said that, as the Defendant had been arrested whilst

1835.
 WALKER
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 CHRISTIAN.

he was in Custody under the *Ne exeat*, this Court clearly had Jurisdiction to discharge him. They cited *Ex parte Ward* (a), *Barratt v. Price* (b), *Wells v. Gurney* (c), *Ex parte Moore* (d), *Wheelwright v. Joseph* (e), *Lyford v. Tyrrel* (f), *Barlow v. Hall* (g), *Ex parte Ledwich* (h), *Sidgier v. Birch* (i).

Mr. Kindersley and Mr. G. Richards, for the Plaintiffs, contended that the Court of Chancery had no Jurisdiction to grant the Application, and that there was no Case in which The Lord Chancellor had ordered a Party to be discharged from Arrest, except in Bankruptcy.

THE VICE-CHANCELLOR :

The question arises thus: A *Ne exeat* having issued, under which the Defendant was taken into Custody, an Order was afterwards made to discharge it. On the day on which that Order was made, but whilst the Defendant was still in Custody, the Plaintiffs in Equity, who were also the Plaintiffs at Law, obtained a new Writ at Common Law, and, by virtue of it, detained the Defendant whilst he was in Custody under the *Ne exeat*: and an Application is now made to me, in the Cause in this Court, to discharge the Party so Arrested at Law. If the Case had been reversed, and the Party had been Arrested at Law under circumstances which made it right for the Judge at Law to discharge him, and, whilst he was in Custody, he had been detained under the

(a) 1 Atk. 153.

(b) 9 Bing. 566.

(c) 8 Barn. & Cress. 769.

(d) Buck. 521.

(e) 5 M. & S. 93.

(f) 1 Ans. 85.

(g) 2 Ans. 461.

(h) 8 Ves. 598.

(i) 9 Ves. 69.

CASES IN CHANCERY.

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, I should have had no doubt that this Court
isdiction to direct him to be discharged. But I
ollect any instance of an Application, similar to
ent, being made to the Court of Chancery.
Bankruptcy are entirely different; for The
ancellor has a general Jurisdiction over all the
o a Commission. But the Court of Chancery
uch Jurisdiction in a Cause. It has no Juris-
ver any proceeding at Law that may take place
the Parties to a Cause. And, in my opinion,
rt ought not to assume to itself the right of in-
nto the validity of the Process of a Court of
Law. The Judge at Law is the proper per-
ecide upon the validity of the Common Law
and, as the Parties will shortly go before Mr.
Bosanquet, it appears to me to be right and
ectful to that learned Judge, to leave it to him
ine whether, under the circumstances of this
Common Law Process ought to be made avail-

1835.

WALKER
v.
CHRISTIAN.

Defendant had determined to appeal; but, as he
urged by Mr. Justice *Bosanquet*, it became unneces-

1835:
26th March.

CLAY v. PENNINGTON.

Will.

Construction.

Testator bequeathed his Residuary Estate to his Grandchildren, and in case they should all die without leaving Issue, then to the Children of A. and their Issue, in equal Shares, or unto such of them as should prove their Right within two years after the death of his Grandchildren without Issue. A. had five Children, two of whom were living at the date of the Will and survived the Testator; the others died before the date of the Will, but two of them left Issue. Held that all A.'s Descendants who were living at the death of all the Testator's Grandchildren without Issue, or who should be born within the two years, would be entitled to participate in the Residue.

JOHN DIXON, by his Will dated the 21st of May 1800, gave the residue of his Personal Estate to Trustees, in Trust to pay the Interest to his Daughter, *Elizabeth Goff*, Widow, during her life, and, after her death, in case she should leave any Children by any future Marriage, in Trust to pay the Capital amongst such Children and his Granddaughter, *Ann Goff*, in equal shares; but, if his Daughter should leave no Children by a future Marriage, then, to his Granddaughter, *Ann Goff*: and in case his said Granddaughter or any of his Grandchildren thereafter to be born, should happen to die before the Monies thereinbefore directed to be paid to her, him, or them, should be actually paid, due or payable, leaving lawful Issue, such Issue was to take and be entitled to his, her or their deceased Father or Mother's Shares, in equal Shares and Proportions if more than one, and, in default of such Issue, the Share or Shares of him, her, or them so dying, was and were to go and survive to the other or others of them, his said Grandchildren, in equal Shares and Proportions, and to the Issue of such of them as should be then dead leaving lawful Issue: and in case all his said Grandchildren should happen to die without leaving Issue before the Bequests thereinbefore mentioned should respectively become due, then he gave and bequeathed all his said surplus Monies unto the Children of his Brother, *Benjamin Dixon*, and their lawful Issue, in

equal Shares and Proportions, or unto such of them as should make and prove their Right, to the satisfaction of his Trustees, within two Years next after the first Notice thereof to be given in The London Gazette, and which Notice he directed his Trustees to insert once each Month for the first six Months next after failure of Issue of his said Daughter.

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CLAY
v.
PENNINGTON.

The Testator died shortly after the date of his Will. *Ann Goff* died, without Issue, in 1821. *Elizabeth Goff* died in May 1832, without having been married after the date of the Will. *Benjamin Dixon*, the Testator's Brother, had five Children, three of whom were dead at the date of the Will: the other two survived the Testator and died, in the lifetime of *Elizabeth Goff*, leaving Issue: and two of *Benjamin Dixon's* other Children who died in the Testator's lifetime, left Issue living at the death of *Elizabeth Goff*.

The Bill was filed by the Issue of the two Children of *Benjamin Dixon* who survived the Testator, against the surviving Trustee of the Will and the Issue of the two other Children of *Benjamin Dixon*, praying that the Rights and Interests of the Plaintiffs in the Testator's Residuary Estate, might be ascertained, and that their Shares might be transferred to them.

Mr. *Knight* and Mr. *Turner*, for the Plaintiffs, said that the Question was, whether, under the Bequest to the Children of *Benjamin Dixon* and their lawful Issue, the two Children who were living at the date of the Will, did not take absolute Interests; inasmuch as those words would have created an Estate Tail in real Estate: but, if the word "Issue" was to be considered as a word of Purchase, then the Testator could not have

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CLAY
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PENNINGTON.

intended to give to the Issue of a Child, which Child could not take; and, consequently, that the Issue of the two Children who survived the Testator, were alone entitled to the Fund.

Mr. *Kindersley* appeared for the Defendants.

The *Vice-Chancellor* said that it appeared, from the Context of the Will, that the Testator, by the word "Issue," meant "Children:" and that he intended that all the Children and the Issue of all the Children of *Benjamin Dixon*, who should prove their Right within two Years and one Month after the death of his Grandchildren without Issue, should participate in the Fund; and that, in the Events that had happened, all the Descendants of *Benjamin Dixon* who were living at the death of *Elizabeth Goff* or who should be born within two Years and one Month after that event, would be entitled to participate in the Fund.

BAKER v. HARWOOD.

1835:
22d April.

Pleading.
Parties.
Heir.
Outstanding
Terms.

Bill stated that *T. E. Baker*, the Plaintiff's
1, being, in his lifetime, seised in Fee of divers
s, &c. died in March 1833, leaving no Issue and
ite, and leaving the Plaintiff, *Sarah Baker*, and
efendant, *Maria Baker*, his Co-heirs at law, and
efendant *Mary Ann*, (who afterwards married the
lant *Harwood*,) his Widow: that, upon *T. E.*
's decease, the Plaintiff and *Maria Baker*, as such
rs, became entitled to the whole of the Estates;
s Widow entered into Possession thereof, claim-
be entitled thereto under some Will alleged to
een executed by *T. E. Baker*, and possessed herself
Title-deeds thereof, and she and her second Hus-
had ever since continued in Possession of the
s, and refused to produce the Title-deeds: that
aintiff and the Defendant *Maria Baker*, had com-
d an Ejectment, on their joint and several demises,
t *Harwood* and Wife, to recover possession of the
s: that there were some outstanding Terms subsist-
the Estates, which, if set up by way of Defence,
defeat the Ejectment: that the Defendants, *Har-*
nd Wife, threatened to set up those Terms: that the
bject of the Action was to try the validity of the
d Will: that no such Will had been executed;

The Bill stated
that *A.*, the
Plaintiff's
Cousin, died
intestate and
without Issue,
leaving the
Plaintiff, and
B., a Defend-
ant, his Co-
heirs: that *C.*,
the other De-
fendant, had
entered into
possession of
A.'s Estates
under an al-
leged Will:
that Plaintiff
and *B.* had
brought an
Ejectment
against *C.* on
their joint and
several demises:
that there were
outstanding
terms which *C.*
threatened to

set up, and which would defeat the Ejectment, and that *B.* refused
to join in the Suit. The Bill prayed for a discovery and produc-
tion of Deeds, and to restrain the setting up of the Terms. Held
that the allegation of outstanding Terms was sufficient; but that the
Title by descent was not stated with sufficient particularity.

Semble, that *B.*'s not joining in the Suit, was also fatal to the Bill.

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 v.
 HARWOOD.

or, if it had, that it had been Revoked. The Bill prayed that *Harwood* and Wife might be compelled to make Discovery of the matters aforesaid, to the end that the Plaintiff might be enabled to Prosecute the Ejectment; that they might produce, at the Trial, all the Deeds and Writings relating to the Estates or such of them as might be necessary, and be restrained from setting up any outstanding Terms subsisting in the Estates. The Prayer of Process contained the Words: "Stand to and abide such Order and Decree, &c."

Harwood and Wife put in a General Demurrer.

Mr. *Knight* and Mr. *Turner*, in support of the Demurrer:

The Allegation of outstanding Terms, which is the only Equity that the Bill contains, is too vague and general to support it. Some information should be communicated to the Court with regard to the nature of the Terms; for they may be such as the Defendants might properly use to defeat the Ejectment: it ought to be shown that it would be inequitable in the Defendants to set up the Terms. *Jones v. Jones* (a), *Stansbury v. Arkwright* (b).

Secondly: One only of the Plaintiffs at Law, is Plaintiff in this Suit: the other is a Defendant; and therefore the Bill is not so framed as to place the Proceedings at Law under the control of this Court. The Bill prays Relief as well as Discovery; and *Aston v. Lord Exeter* (c), and *Hylton v. Morgan* (d), decide that, in such a case, this Court will not aid a Proceeding at Law,

(a) 3 Mer. 161. 172.

(b) *Ante*, Vol. VI. p. 481.

(c) 6 Ves. 288.

(d) *Ibid.* 293.

unless it is placed under its Control. This Court never relieves on a purely legal Title, except where the Proceedings at Law are placed under its Control. *Beer v. Ward* (e). Suppose that this Cause proceeds to a Hearing, and that, in the progress of it, *Harwood* and Wife examine Witnesses *de bene esse*; how could the Court order *Maria Baker*, who is a Defendant in this Suit, to permit the Evidence, so taken, to be read against her? Co-plaintiffs at Law cannot sever for the purpose of obtaining that which is auxiliary only to their proceeding at Law.

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Thirdly: The Bill violates one of the most settled Rules of Pleading. In stating a Title by descent, a Plaintiff cannot allege, merely, that he is Cousin and Heir, but must state his Title technically and regularly, so as to show how he is Heir. Heirship is a conclusion of Law resulting from Facts: the Facts must be stated.

Mr. *Girdlestone*, junior, in support of the Bill:

The Bill does not seek to change the Jurisdiction; but simply asks the Court to give such Directions as that the Action may be fairly Tried before the proper Jurisdiction.—[The *Vice-Chancellor*: It appears to me that the Allegation of outstanding Terms is sufficient.]—The second Objection is, that the Title of the Plaintiff is not sufficiently alleged. The Bill states the relationship between the Plaintiff and the Deceased, and that he died without Issue.—[The *Vice-Chancellor*: In pleading a Title by descent, the rule of this Court is to follow the rule of Pleading at Law. The Defendant is entitled to be apprised of all the Links which

(e) Jac. 194. See the Judgment.

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constitute the Chain of Descent.]—With respect to the third Objection: Either of the Co-plaintiffs at Law may proceed with the Action, though the other does not: why then may not one of them alone come into Equity? The Bill alleges that *Maria Baker* refuses to join in the Suit; and that Allegation must be taken to be true. The Action is brought on the joint and several demurs of the Co-plaintiffs: why is one of them to be precluded from relief to which she is entitled, because the other does not choose to ask for it? The Court may restrain the setting up of Terms as against the Plaintiff in Equity alone. It has the control of the Action so far as the Plaintiff is concerned.

THE VICE-CHANCELLOR:

The refusal of *Maria Baker* to join in the Suit, abridges the Power of the Court over the Action. This Suit could not be brought to a Hearing without obliging the Court to interfere with the Action.

But it is only necessary for me to say that, in my Opinion, the Descent is so imperfectly stated that the Demurrer must be allowed. I will, however, allow you, Mr. *Girdlestone*, to amend the Bill, for the purpose of stating the Title by Descent with greater particularity, provided you will undertake to join *Maria Baker* as a Co-plaintiff in it.

Mr. *Girdlestone*:—I have no authority to do so.

The *Vice-Chancellor*:—Then I allow the Demurrer on the ground that the Title as Heir, is not properly stated.

MEMORANDUM.

On the 23d of April 1835, Sir *C. C. Pepys*, Master of the Rolls, Sir *Lancelot Shadwell*, Vice-Chancellor of England, and Sir *John Bernard Bosanquet*, one of the Judges of the Court of Common Pleas, were appointed Lords Commissioners for the Custody of the Great Seal, on the Resignation of Lord *Lyndhurst*, C.

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And, about the same time, Sir *F. Pollock*, His Majesty's Attorney-General, and Sir *W. W. Follett*, His Majesty's Solicitor-General, resigned their Offices, and were respectively succeeded by Sir *John Campbell* and *R. M. Rolfe*, Esq., who shortly afterwards received the honour of Knighthood.

SPALDING v. KEELY.

MOTION to extend the Common Injunction to stay Trial, supported by an Affidavit made by the Plaintiff's Solicitor.

The *Vice-Chancellor* refused to make the Order, on the ground that the Affidavit had not been made by the Plaintiff himself, nor was any sufficient Reason assigned why it had not been so made.

Mr. *Chandless* for the Motion.

Mr. *Knight*, *contra*.

1835:
23d April.

Practice.
Injunction.

The Affidavit in support of a Motion to extend the Common Injunction, must be made by the Plaintiff himself, unless a sufficient Reason is assigned for its not being so made.

1835:

25th April.

Costs.

Disclaimer.

Defendant.

A Bill was filed in consequence of a Claim to a Fund made by a Defendant. The Defendant, in his Answer, disclaimed all Right to the Fund, but stated certain Facts as the ground for his not being ordered to pay the Costs of the Suit. The Plaintiffs entered into Evidence, by which they falsified those Statements. The Court held that they were justified in so doing, and ordered the Defendant to pay the Costs of the Suit.

DEACON v. DEACON.

THE Plaintiffs claimed, as the lawful Issue of *William Deacon*, the Testator in the Cause, to have a Sum of Stock, of which three of the Defendants were Trustees, transferred to them. The Suit was instituted in consequence of *James Williamson Deacon*, the other Defendant, having claimed a Share of the Stock, as being the Legitimate Child of *James Deacon*, deceased, one of the Testator's Sons.

Before the Bill was filed, the Solicitor for the Trustees applied to *J. W. Deacon*, first, to produce Evidence of his Legitimacy, and, afterwards, to make an Affidavit that he believed himself to be Legitimate: and, before he put in his Answer, the Plaintiffs applied to him to execute a Release of his Claim and pay the Costs out of Pocket: but neither of the Applications was successful. The Bill charged that *J. W. Deacon* was Illegitimate, and prayed that the Trustees might transfer the Stock to the Plaintiffs, and that *J. W. Deacon* might pay the Costs of the Suit.

J. W. Deacon, in his Answer, said that although he disclaimed, for the Reasons after mentioned, all Interest in the Stock, yet that he had stated and did state that, to the best of his Belief, he was the Legitimate Son and only Child of *James Deacon*: that he believed that his Father and Mother were married, in *Scotland*, previous to his birth, although the Marriage was kept a secret, for several years, to avoid incurring the Testator's displeasure: that he was Born on the 15th of June

1785, and was Baptized, at *Portsmouth*, on the 22d of June 1802 ; and that his Mother was acknowledged and treated, by the Testator's Widow and by the Plaintiffs, as the Wife of *James Deacon*, and that the Defendant himself had been treated and acknowledged by them as the Legitimate Child of his Father and Mother : and he stated various other Facts tending to establish his Legitimacy, and added that, having ascertained the difficulty of proving the actual Marriage of his Father and Mother otherwise than by Reputation supported by the acts and conduct of the Plaintiffs, and being desirous of avoiding Litigation and public Discussion upon the painful subject of the Honour and Reputation of his Parents, and not from any belief of his Illegitimacy, he had determined to forego all Claim to a Share of the Fund, and, accordingly, disclaimed all Interest therein : but he submitted that, under the circumstances stated in his Answer, and, particularly, as the Plaintiffs had treated and acknowledged him as Legitimate, and acted towards and acknowledged his Father and Mother as Man and Wife, and thereby assisted to establish the Reputation of their lawful Marriage and his Legitimacy, he ought to be paid his Costs of the Suit, or, if not, that the Bill ought to be dismissed, as against him, without Costs.

The Plaintiffs examined a great number of Witnesses in order to falsify the above Statements in the Answer. *J. W. Deacon* did not enter into any Evidence.

Mr. Knight and *Mr. Rogers*, for the Plaintiffs, contended that the Costs of the Suit ought to be paid by *J. W. Deacon*, as he might have stayed the Proceedings in the Suit at any time : *Praed v. Hull* (a) : and as the Evidence had been rendered necessary by his having

(a) 1 Sim & Stu. 331.

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submitted, on the grounds stated in his Answer, that he ought to be paid the Costs of the Suit, or, if not, that the Bill ought to be dismissed, as against him, without Costs.

Sir C. Wetherell and Mr. Wray, for *James W. Deacon*.

Sir W. Horne and Mr. Blunt, for the Trustees.

THE VICE-CHANCELLOR :

My Opinion is that the Disclaimer is complete for the purpose of authorizing the Court to direct the Transfer of the Fund to the Plaintiffs; but I do not think that it is so couched as, of itself, to give the Plaintiffs the Right to the Costs; for it is connected with such words as make the Right to the Costs depend on the Truth of the Allegations in the Answer.

It is, certainly, to be regretted that the Dispute has been allowed to proceed to the length which it has. In my Opinion, however, if Mr. *J. W. Deacon* had but known his own Mind at the beginning, the Suit would not have been commenced.

After he had made his Claim to a Share of the Fund, and just before the Bill was filed, it was proposed to him that he should make an Affidavit as to his Legitimacy; but that Affidavit he refused to make. If he had thought that he could make a reasonably probable Case upon Affidavit, he ought to have made the Affidavit, and tendered it to the Trustees and seen what use they made of it. Then the Bill was filed, and, afterwards, there was a good deal of Discussion about the terms in which the Release should be framed: and I cannot but think that the Terms proposed by the Solicitors for the Plaintiffs and their Offer to accept the Costs out of Pocket, were very fair indeed; for it is plain, that, up to that time, all

the Costs ought to have been paid by *J. W. Deacon*. He, however, litigiously refused to accede to the Proposal, and then the Answer was put in. Now, if Mr. *J. W. Deacon* had, as he ought to have done, contented himself with saying that, in fact, he did believe that he was the Legitimate Child of his Father and Mother, but that he disclaimed all Right to the Fund and was willing to pay the Costs of the Suit, which, it is to be observed, he had caused by his Claim, there would have been an end of the Suit. But, instead of that, he says, in his Answer: "That although he disclaims, for the Reasons after mentioned, all Interest in the Fund, yet he admits that he hath stated and doth now state, to the best of his Belief, that he is the Legitimate Son and only Child of the said *James Deacon*." And, at the end of his Answer, he says that: "for the reasons before mentioned, and not from any belief whatever of his Illegitimacy, he disclaims all Right and Interest in the Trust Fund, in the said Bill mentioned, or any part thereof: and this Defendant submits that he ought, under the circumstances aforesaid, and particularly under the circumstances of the Plaintiffs having treated and acknowledged him to be Legitimate, and acted towards and acknowledged his Father and Mother as Man and Wife, and thereby assisted to establish the Reputation of their lawful Marriage and the Legitimacy of this Defendant, this Defendant ought to be paid his Costs of this Suit, or, if not, that the Bill ought to be dismissed against him without Costs." So that, though he gives up his Right to the Fund, he still raises the Question of Costs, and makes that Question depend upon the Truth of the Allegations that the Plaintiffs had treated and acknowledged him as being Legitimate, and had acted towards and acknowledged his Father and Mother as Man and Wife, and thereby assisted to establish the Reputation of their lawful Mar-

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riage and the Defendant's Legitimacy. Then the Plaintiffs, in order to falsify the Assertion that they had treated and acknowledged the Defendant as being Legitimate, entered into Evidence to show that he was not, and that the Reputation in the Family was that he was not Legitimate, and, consequently, that it was not probable that they had acknowledged him to be so. All the Members of the Family, and all persons connected with the Defendant, seem to have thought that he was not Legitimate: and, moreover, the Evidence establishes, beyond all controversy, that the Defendant, at the time when he put in his Answer, must have known that the Plaintiffs did not acknowledge him to be Legitimate and had never done so. Therefore the facts which the Defendant states, in his Answer, as the ground for his being paid his Costs, or, at least, for the Bill being dismissed, as against him, without Costs, are effectually disproved. Then the Defendant has not entered into any Evidence in support of those Facts; and, as the Evidence is all on one side, I do not mean to decide the Question whether, in fact, the Plaintiff is or is not Legitimate. All that I mean to say is that, on the Evidence now before me, it must be taken that he is Illegitimate, and that he was never reputed to be, or treated or acknowledged, by the Plaintiffs, as being Legitimate.

My Opinion, therefore, is that the Defendant has totally failed in the issue of Fact which he has tendered, and which it was incumbent on the Plaintiffs to disprove, if they meant to have the Question of Costs decided in their favour. The consequence, therefore, is that I shall direct the Fund to be transferred to the Plaintiffs, and that they do pay the Costs of all the Defendants except *James Williamson Deacon*, and that he do pay the Plaintiffs their Costs, together with the Costs which they shall have paid to his Co-defendants.

MOORE v. USHER.

1835:
5th May.

*Interpleader.
Injunction.*

was an Interpleading Suit respecting 440 *l.*; the
of a Sum of 500 *l.* which had been placed in the
s hands by *Sarah Love* deceased, and out of
e Plaintiff, at her request, had paid 60 *l.* to
urman. The Bill prayed that the Defendants
terplead together respecting the 440 *l.*, and

Defendant, *Lake*, might be restrained from
ing any Action against the Plaintiff for the
of that Sum, and that the other Defendant,
er, who was the Sister and Administratrix of
ove, might be restrained from proceeding with
n which she had commenced against the Plain-
e recovery of the 500 *l.*

Plaintiff first obtained the Common Injunction,
moved to extend it to stay the Trial of the
ffering to pay the 440 *l.* into Court.

Question on the hearing of the Motion, was
he Plaintiff had proceeded regularly.

imes, for the Plaintiff, cited *Croggon v. Sy-*

Anderdon, for the Defendant *Mrs. Usher*, ob-
st, that the Plaintiff did not offer to pay, into
e whole of the Sum which was the subject of
1: Secondly, That, in an Interpleading Suit, it

The Plaintiff in
an Interplead-
ing Suit, first
obtained the
Common In-
junction, and
then moved to
extend it to
stay Trial.

Motion refused.
The Common
Injunction stays
Proceedings at
Law till *Answer*
or further
Order: the In-
junction in an
Interpleading
Suit, stays them
till further
Order.

(a) 3 Madd. 130.

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USHER.

was not the Practice to obtain the Common Injunction.

Mr. G. Richards, *amicus curiæ*, mentioned *Warrington v. Wheatstone (b)*.

The VICE-CHANCELLOR :

My Opinion is that the Application is wrong. The Common Injunction stays Proceedings at Law till Answer or further Order: the Injunction granted on a Bill of Interpleader stays them till further Order (c).

Motion refused with Costs.

13th May.

Interpleader.

Where the Depositary of a Fund has a Personal Interest in contesting a Question relating to part of the Fund, with one of the Claimants of it, he cannot properly file a Bill of Interpleader respecting it.

Public Policy.
Maintenance.

A. provided a Fund for defraying the Expenses of obtaining an Act of Parliament to dissolve the Marriage of B. & C., who was A.'s illegitimate Daughter. Held that the Transaction was not illegal.

The Plaintiff now moved for an Injunction, on payment of the 440 l. into Court, to restrain Mrs. Usher from further proceeding in her Action, or to restrain her from proceeding to recover more than the 60 l. paid to Surman; and for an Injunction against Lake, as before; and, if necessary, that the Common Injunction against the Defendants, might be dissolved.

The following were the facts of the Case, as they appeared by the Bill and the Affidavit in support of it.

In the early part of 1831, a Bill was brought into the House of Lords for dissolving the Marriage of G. H.

(b) Jac. Rep. 202.

(c) See *Seton* on Decrees, 338. It seems that an Injunction may be obtained in an Interpleading Suit, without Notice or Affidavit of Merits, on paying the Money in dispute into Court. That an Affidavit is not necessary, see *Walbanke v. Sparks, ante*, Vol. I. p. 385.

Calcraft with *Emma* his Wife, on account of Adultery: but Mr. *Calcraft* not being able to pay the Expenses of the Proceedings in Parliament, Mrs. *Love*, who was the natural Mother of Mrs. *Calcraft*, on the 15th of January 1831, lodged, with the Plaintiff, 500 *l.* for that purpose; and the Plaintiff gave her an acknowledgment in the following words: "I have received your 500 *l.*, which shall be delivered to you or your Order at three days' sight unless it is used for the Purpose it is lodged with me: but, before I part with it, I expect your Consent in writing; and, when I deliver this Money out of my Keeping, it is necessary you deliver this Memorandum back to me." The Plaintiff, in consequence of Instructions received from Mrs. *Love*, informed the Defendant *Lake*, who was Mrs. *Calcraft*'s Solicitor, of the Deposit and of the purpose for which it had been made; and, as the Agent and by the direction of Mrs. *Love*, proposed to *Lake* that he should conduct the Proceedings in Parliament for Mr. *Calcraft*: and the Plaintiff, at the same time, offered to give *Lake* his own written Undertaking for payment of the Costs and Expenses. *Lake* undertook to conduct the Proceedings, but declined the Plaintiff's offer of a written Undertaking, stating that the Plaintiff's word was quite sufficient. *Lake*, accordingly, caused the Bill to be brought into the House of Lords, and conducted the Proceedings relating to it until it was thrown out. After the Bill had been brought in, Mrs. *Love*, having learnt that it contained a Clause prohibiting Mrs. *Calcraft* from intermarrying with the person with whom she had committed Adultery, requested the Plaintiff to employ his own Solicitor to watch the Proceedings in Parliament, and, at a proper time, to move to have the prohibitory Clause struck out: and the Plaintiff, accordingly, employed *W. H. Surman* for that purpose. After the Bill

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had been thrown out, Mrs. Love desired the Plaintiff to apply the 500*l.* in payment of the Costs and Charges of Lake and Sarman. The Plaintiff, accordingly, wrote to them for their Bills, and paid Sarman's Bill, which amounted to 60*l.* out of the 500*l.* In 1831, and before Lake had delivered his Bill, Mrs. Love died Intestate, and the Plaintiff took out Administration to her.

In February 1835, Lake sent, to the Plaintiff, a Notice in the following words: "I hereby give you Notice that I claim the Sum of 440*l.* now in your hands, being the Residue of a Sum of 500*l.* deposited with you, by Mrs. Sarah Love deceased, for the purpose of being applied by you in or towards payment of my Bill of Costs, Charges and Expenses incurred in and about the Prosecution of certain Proceedings in Parliament instituted by me, in or about the year 1831, for the purpose of obtaining an Act to dissolve the Marriage of G. H. Calcraft, Esq., with Emma his Wife: and I hereby also give you Notice and require you to pay the said Sum of 440*l.* to me towards payment of my said Bill: and, unless you pay the same to me, I shall proceed against you forthwith for the recovery thereof."

In March 1835, Mrs. Usher, served the Plaintiff with a Notice as follows: "I hereby request you will deliver to Mr. John Theobald of Thavies-Inn, my Attorney, the 500*l.* placed in your hands by the late Mrs. Sarah Love: and I hereby consent to your so doing: and I hereby give you Notice that, when you deliver the said 500*l.* to the said Mr. J. Theobald, the Memorandum dated the 15th January 1831, and given by you to the said Sarah Love on the occasion of her placing the said 500*l.* in your hands as aforesaid, shall be delivered back to you: and I hereby also give you Notice that I

shall require you to pay legal Interest on the said 500 *l.* from the date hereof until the time of Payment." Mrs. *Usher*, afterwards, commenced an Action against the Plaintiff, as before mentioned.

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Mrs. *Usher*, in her Answer, said that, to the best of her belief, Mrs. *Love* deposited the 500 *l.* with the Plaintiff, not for the purpose of paying the Expenses of the Proceedings in the Bill mentioned, but of obtaining an Act of Parliament for dissolving the Marriage, without the prohibitory Clause: she denied all knowledge of Mrs. *Love* having authorized the Plaintiff to employ either *Lake* or *Surman*, or to pay their Bills out of the 500 *l.*: and she submitted that the Bill was not a proper Bill of Interpleader, but, if it was, that the Plaintiff was bound to pay into Court the full Sum of 500 *l.*

Mr. *Knight* and Mr. *James*, in support of the Motion.

Mr. *Kindersley* for the Defendant, *Lake*.

Mr. *Jacob* and Mr. *O. Anderdon*, for the Defendant Mrs. *Usher*, said, first, that the purpose for which the 500 *l.* was deposited with the Plaintiff, either amounted to Maintenance, or was a Fraud on the Legislature: The *Vauxhall Bridge Company v. Earl Spencer* (a): Secondly, that the Answer did not admit that the Plaintiff was authorized, by Mrs. *Love*, to employ either *Lake* or *Surman* or to pay their Bills, and, therefore, he might have created a personal Demand against himself: and thirdly, that Mrs. *Usher* claimed the 500 *l.*, with Interest;

(a) 2 Madd. 356, and Jac. 64.

1345.

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v.
USHER.

but *Lake* claimed the 440*l.* only without Interest, and, therefore, that the two Defendants did not claim the same thing. *Mitchell v. Hayne* (b).

THE VICE-CHANCELLOR:

I do not think that any valid Objection can be made to this Bill, on the ground that the 500*l.* was placed in the Plaintiff's hands for a purpose which amounted to Maintenance, or was against Public Policy. No Action or Suit was depending or was intended to be commenced. The Bill in Parliament was a Bill of a private nature (c): and the Mother of the Wife thought right to assist the Husband in prosecuting the Bill. Nor do I think that what took place between the Plaintiff and *Lake*, amounts to a Retainer by the Plaintiff. The Notice given by *Lake* shows that he does not Claim by virtue of any Retainer by the Plaintiff, but on account of his having been informed that the Fund had been lodged with the Plaintiff, for the purpose of paying his Bill of Costs to be incurred in the proposed Proceedings in Parliament.

There is, however, this difficulty in the Case, that *Lake* claims the 440*l.*, the Residue of the 500*l.* after paying *Surman*, and Mrs. *Usher* Claims the whole 500*l.*

Mr. Knight:

Although *Lake's* Notice relates to the 440*l.* only (that being all that is left of the 500*l.*), he claims the whole 500*l.* We are willing to bring the whole 500*l.* into

(b) 2 Sim. & Stu. 63.

(c) See *Edwards v. The Grand Junction Railway Company*, ante, 337.

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court. In *Mitchell v. Hayne* the Plaintiff did not offer to
ing in the whole of the Sum in dispute. The Pur-
aser, if he was entitled to any part of the Sum, was,
necessity, entitled to the whole. The 60*l.* was paid
Surman in the lifetime and by the direction of Mrs.
we, and without Notice of any adverse Claim. Sup-
sing however that the 60*l.* was erroneously paid to
r. Surman, that circumstance would not make this
is a Case of Interpleader as between *Lake* and Mrs.
sher. The Title to the 60*l.* does not, of necessity,
rry with it the Title to the 440*l.* The 500*l.* was
iginally deposited with a view to provide for the Costs,
both sides, of soliciting the Act of Parliament. One
t of Costs has been paid out of the 500 *l.*; and, there-
re, part of that Sum has been taken out of dispute;
d the Residue is a proper subject of Interpleader.
ne Plaintiff is not the less a Stakeholder with respect
the 440*l.*, because the Stake was once greater. The
ourt may restrain the Action as to the 440*l.*, and
low it to proceed as to the 60*l.*

The VICE-CHANCELLOR :

I do not recollect any Case in which a Plaintiff has
ed a Bill which, on the face of it, is a Bill of Inter-
eader, and then insisted that he was entitled to stop
e Action in part. Interpleader is for the purpose of
eventing the Plaintiff from being Sued by two per-
ns in respect of the same Subject. Here the Action
brought by Mrs. *Usher*, for the whole 500 *l.*

The Question, however, appears to be of so much im-
rtance, that I have no objection to the Motion stand-
g over, in order that you may have an opportunity of
oking into it further.

1835 :
29th May.

MOORE
v.
USHER.

Mr. *Knight* said that he had not been able to find any additional Authority.

The VICE-CHANCELLOR :

When this Case was last before me, it did not appear that there was any Case in which the Plaintiff in a Bill of Interpleader, had any Personal Interest in contesting any Right with one of the litigant Parties. It is essential to the Character of a Plaintiff in such a Bill, that he should have no Personal Interest.

This Plaintiff stands in a situation in which no Plaintiff in a Bill of Interpleader ever stood before ; for he has to litigate a Question, as to the Right to part of the Fund, with one of the litigant Parties : and I think that, as far as Authority goes, this is not a proper Case of Interpleader. If, however, the Plaintiff will pay to Mrs. *Usher* the 60*l.* I will make the usual Order in an Interpleading Suit ; otherwise, the Motion must be refused with Costs.

CRAWSHAY v. THORNTON.

1835:
7th & 11th
May.

THE Plaintiffs were Co-partners as Iron Merchants in London, and had a Bonded Yard for Foreign Iron. They also acted as Wharfingers. In 1832, *Raihes & Co.* who, previously, had been in the habit of depositing Foreign Iron in the Plaintiffs' yard for safe custody, deposited with them certain Parcels of Iron described in the Bill: and, in the early part of 1833, a written Order, signed by *Raihes & Co.*, was brought to the Plaintiffs requiring them to weigh and deliver the Iron, but not mentioning the name of the person to whom it was to be delivered. A verbal Message, however, was left, that the same was for Mr. *Thornton*. No Application having been made for the delivery of the Iron, *W. Routh*, one of the Plaintiffs, wrote, in pencil, in the Book of his Firm which contained an Account of the Iron, the name "*Thornton*," against each of the Parcels mentioned in the Order. In March 1834, application was made to the Plaintiffs by the Defendant *Thornton*, who was a Partner in the Firm of *Williams, Deacon, Labouchere & Co.*, to know the Particulars of the Iron which the Plaintiffs held on his Account: and, thereupon, *Routh* called on *Richard Mee Raihes*, (who was the person then carrying on Business under the Firm of *Raihes & Co.*), to ascertain if *Thornton* was the person entitled to the Iron; and *R. M. Raihes* having informed *Routh* that *Thornton* was the person in whose favour the Order for Delivery had been given, *Routh* wrote

Interpleader.

A. deposited Foreign Iron with *B.*, who had a Bonded Yard, and afterwards directed *B.* to deliver it to *C.* *B.* accordingly transferred the Iron, in his Books, to *C.*, and informed *C.*, by Letter, that he held the Iron transferred by *A.* at *C.*'s disposal. Afterwards *D.* demanded the Iron of *B.*, stating that it was in the possession of *A.* as Agent for him, and that *A.* had no Power to deal with it as he had done. *B.*, in consequence of *C.* & *D.* having brought Actions of Trover against him, for the Iron, filed a Bill of Inter-

pleader against them. Held that, as the Letter had given *C.* a right against *B.*, independent of his character of Depositary, it was not a Case of Interpleader.

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against the Entry of each of the Parcels, in the Book of his Firm which contained the Particulars of the Iron, as follows: "8th March 1834: transferred to *H. S. Thornton*:" and the Plaintiff *W. H. Crawshay*, at the same time, wrote, to *Thornton*, a Letter in the following words:

"Sir,—In compliance with your Request, we annex a Note of the Landing Weights of the various Parcels of C. C. N. D. Iron, transferred into your name by Messrs. *W. & T. Raikes & Co.*, and now held by us at your disposal.

"We are, &c.

"*Rich. & W. Crawshay & Co.*"

R. M. Raikes became Bankrupt in October 1834; but neither he nor his Assignees claimed any Interest in the matters mentioned in the Bill.

On the 8th of October 1834, the Plaintiffs received, from Messrs. *Lemmé & Co.*, of *London*, Merchants, a Letter in the following words:

"Gentlemen,—You will please to take notice that the whole of the C. C. N. D Iron lying at your Wharf, is the Property of Messrs. *P. Daniloff & A. Lubinoff* of *St. Petersburg*, and that Messrs. *W. & T. Raikes & Co.* were Agents to them for the Sale thereof, and had no Power to pledge the same. Hearing, however, that Messrs. *W. & T. Raikes* have Pledged certain parts of the above Iron to Messrs. *Williams, Deacon, Labouchere & Co.*, and that you have the Authority of the latter to hold such Iron at their disposal, we beg to inform you that their Authority is nugatory; and you are hereby required to treat it as a nullity and not to part with the

Possession of any part of such C. C. N. D. Iron, but hold the whole thereof at the disposal of Messrs. *P. Daniloff & A. Lubinoff*."

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P. Daniloff, the person mentioned in the above Letter, and who was the other Defendant to the Bill, carried on Business at *St. Petersburg*, under the Firm of *P. Daniloff & A. Lubinoff*.

In December 1834, *Thornton* offered to pay, to the Plaintiffs, their Charges in respect of the Iron, and demanded the delivery of it; and, in January 1835, a like Demand and Offer was made by *Lemmé*, as the Agent and on the behalf of *Daniloff*.

In the same month, *Thornton* and *Daniloff* commenced Actions of Trover against the Plaintiffs, to recover the Iron.

The Bill, after stating as above, alleged that the Warehouse-rent, Charges, and Expenses on the Iron, due to the Plaintiffs, amounted to 160*l.* 15*s.* 6*d.*; and that the Plaintiffs claimed no Interest in, or Right to the Iron, except in respect of their Charges, their Right to which was admitted by both the Defendants: that *Daniloff* alleged that he claimed the Iron by a Title paramount to the Title of *Thornton* or the persons under whom *Thornton* claimed the same.

The Bill prayed that *Thornton* and *Daniloff* might be Decreed to Interplead together, respecting the Iron, and that proper directions might be given with respect to the Plaintiffs' Lien thereon; and for Injunctions to restrain the Actions

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Thornton put in a General Demurrer.

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Mr. *Jacob*, Mr. *Girdlestone* and Mr. *Wilson*, in support of the Demurrer, said that the Plaintiffs, by transferring the Iron and writing the Letter of the 8th of March 1834, to *Thornton*, had, conclusively acknowledged his Right to the Iron, and, by their own Act, constituted the relation of Principal and Agent between themselves and him; and, consequently, that the Plaintiffs were liable to *Thornton*, whether he was or was not the real Owner of the Iron: that the Plaintiffs sought to be placed in the same Situation as if they had never acknowledged *Thornton's* right; but which they were not entitled to be, unless they could show some circumstances of Equity which would do away with the effect of the Acknowledgment; no such circumstances, however, were stated in the Bill: that an Agent could not file a Bill of Interpleader against his Principal, nor could a Tenant dispute the Title of his Landlord, except in consequence of Acts done *subsequent* to the Delivery of the Goods in the one Case, and to the granting of the Lease in the other. *Cowtan v. Williams* (a), *Stonard v. Dunkin* (b), *Roberts v. Ogilby* (c), *Hawes v. Watson* (d), *Gosling v. Birnie* (e), *Lowe v. ———* (f), *Nickolson v. Knowles* (g), *Cooper v. De Tastet* (h), *Pearson v. Cardon* (i), *Adamson v. Jarvis* (k), *Slingsby v. Boulton* (l).

(a) 9 Ves. 107.

(b) 2 Camp. 344.

(c) 9 Price, 269.

(d) 2 B. & C. 540.

(e) 7 Bing. 339.

(f) 3 Madd. 277.

(g) 5 Madd. 47.

(h) Taml. 177.

(i) *Ante*, Vol. IV. p. 218;
and 2 Russ. & Myl. 606.

(k) 4 Bing. 66.

(l) 1 V. & B. 334. In the
report of appeal in the above
Case (2 Myl. & Craig, 22,

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Do you take the Letter of the 8th of March to be an *absolute* Acknowledgment that the Plaintiffs held the Iron at the disposal of *Thornton*? The Bill represents that the written Order did not mention to whom the Iron was to be delivered; but that a verbal Message was left (without saying by whom) that it was for Mr. *Thornton*; that, *Thornton* having applied to the Plaintiffs for the Particulars of the Iron which they held on his Account, *Routh* called on *R. M. Raikes* to ascertain if *Thornton* was the person entitled to the Iron, and, *Raikes* having informed *Routh* that *Thornton* was the person in whose favour the Order had been given, *Routh* then made an Entry of the Transfer in the Books of his Firm, and wrote, to *Thornton*, the Letter of the 8th of March, which refers to a request made by *Thornton*. It seems to me, therefore, that that Letter acknowledges that the Iron was held at the disposal of *Thornton*, no otherwise than as it was Iron transferred to him by the Order of *Raikes & Co.*: and, if that be so, the Letter gives to *Thornton* no better Right to the Iron than *Raikes & Co.* had.

Mr. *Knight* and Mr. *G. Richards*, in support of the Bill :

We admit that, generally speaking, an Agent cannot file a Bill of Interpleader disputing the Title of his Principal on the ground of an adverse Claim. That is the Rule where there are no Special Circumstances. Here the Question in contest arises on a Title and Claim

13), a Doubt is expressed as to the correctness of the Report of *Pearson v. Cardon* and *Mason v. Hamilton*. The Vice-Chancellor, however, on those Cases being cited to him, did not question the correctness of the Report.

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as existing at the time when the Goods were deposited with the Plaintiffs. If *A.* deposits Goods with *B.*, and, afterwards, an adverse Claim is made to them, that is no Case of Interpleader; for *B.* will be discharged from all Responsibility after he has restored the Goods to *A.* *Daniloff* says that *Raikes & Co.*, as his Agents, deposited the Iron with the Plaintiffs. He does not say that the Deposit was wrong; but that the subsequent Pledge was wrong: and that is what distinguishes this Case from the Cases cited. It is the Act subsequent to the Deposit that has given rise to the adverse Claim: so that this Case is precisely analogous to that in which a Tenant may file a Bill of Interpleader against his Landlord. If the Claimant was one who disputed the Right to make the Original Deposit, the Cases cited would be relevant: but here the validity of everything that was done until after the Deposit, is admitted. The Iron was Foreign Iron, and the Yard in which it was deposited was a Bonded Yard. It was transmitted, by *Daniloff*, to his Agents, *Raikes & Co.*, with directions to deposit it in a Bonded Yard; and, in pursuance of those directions, they deposited it with the Plaintiffs. Therefore, it came into the Possession of the Plaintiffs as Agents for an Agent. The Possession of an Agent is the Possession of his Principal, and consequently the Iron still remains in the Possession of *Daniloff*. The Letter of the 8th of March is not a general, unqualified admission of Title in *Thornton*. It connects the holding at the disposal of *Thornton* with the Transfer by *Raikes & Co.*, and if *Raikes & Co.* had no power to direct the Transfer, there could be no Holding at the disposal of *Thornton*. Besides, when that Letter was written, the Plaintiffs were wholly ignorant of *Daniloff's* Title: and no Acknowledgment can be binding on a Party, who, when he made

it, was ignorant of the real Facts of the Case (m). That Letter merely put *Thornton* in the situation of *Raikes & Co.*

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Pearson v. Cardon, and *Mason v. Hamilton* (n), are the same in principle as the present Case. In *Cooper v. De Tastet* The Master of the Rolls would have come to a different conclusion, if, as was the case here, the Goods had been deposited in a Bonded Warehouse. *Cotter v. The Bank of England* (o), *Wilson v. Ander-ton* (p), *Birch v. Corbin* (q).

Mr. *Jacob*, in reply, said that the circumstance that the real Title was in *Daniloff*, did not alter the effect of the Acknowledgment which the Plaintiffs had given to *Thornton*; and that the Plaintiffs, by their own act, had made themselves liable to him.

The VICE-CHANCELLOR:

If the Bill had represented, merely, that there was a Possession of the Iron by *Raikes & Co.*, that they deposited it in the Plaintiff's Yard, that *Thornton* claimed it under a Dealing between him and *Raikes & Co.*; and, on the other hand, that *Daniloff* claimed it by a prior Title, the Bill would have been a simple Bill of Interpleader. There would have been no Act affecting *Crawshay & Co.* personally. They would have been merely depositaries; and the only Question would have been whether the Goods belonged to *Thornton* or to *Daniloff*. But here there is a circumstance which changes

(m) See Judgment of *Al-derson*, J., in *Gosling v. Birnie*, 7 Bing. 346.

(n) *Ante*, Vol. V. p. 19.

(o) 3 Moore & Scott, 180.

(p) 1 Barn. & Adol. 450.

(q) 1 Cox, 144.

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the position of the Parties, and raises a Question whether, whatever may be the Title of *Daniloff, Crawshay & Co.*, as between themselves and *Thornton*, have not, by their Letter of the 8th of March, made themselves Personally liable, in Trover, to *Thornton*: and it certainly is possible that, although they may have no Defence against *Daniloff*, they may have none against *Thornton*; for the mode in which they have dealt with *Thornton*, may have subjected them, Personally, to an Action by him. And it strikes me that the mere fact that, whatever may be the Title of *Daniloff*, an Action may be maintained by *Thornton*, in which the only Question would be the liability of *Crawshay & Co.* to *Thornton*, makes this not a Case of Interpleader. Interpleader is where the Depositary holds as Depositary merely, and the Claims are made against him in that character only. Here *Thornton* may have some Title independent of the Letter, or he may have a Right to recover against *Crawshay & Co.* independently of Title. The real Question is what is the proper effect of the Letter. I have always had a strong leaning against concluding Parties by admission; and I apprehend that, at *Nisi Prius*, too much weight is given to the mere fact of Admission. The Question in *Thornton's* Action would be whether, in the Letter, there is an absolute Acknowledgment that the Plaintiffs held the Iron at his Disposal. It certainly seems questionable whether the Plaintiffs did mean to acknowledge that they held the Iron for *Thornton*, otherwise than as it had been transferred to him by *Raike & Co.* They may have meant to acknowledge only that it had been so Transferred. In the Letter of the 8th of March, the Plaintiffs do not say, simply, that they hold the Iron at the disposal *Thornton*; but, to some extent, they connect the Holding with the Transfer; and, therefore, it would be hard to say that they meant to acknow-

ledge *Thornton's* Right independently of the Order of *Raikes & Co.*

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Some observation may perhaps arise upon the way in which the Transfer was made. The Bill states that, in and prior to 1831, the persons constituting the Firm of *W. & T. Raikes & Co.* were in the habit of depositing Foreign Iron in the Yard of *Crawshay & Co.*: and that, in 1832, the following among other Parcels of Iron were deposited with *Crawshay & Co.* by the said Firm of *W. & T. Raikes & Co.* The Bill then describes the Iron, and goes on to allege that, in the early part of 1833, a written Order was brought to *Crawshay & Co.*, signed by the Firm of *W. & T. Raikes & Co.*, and requiring *Crawshay & Co.* to Weigh and Deliver the Iron; that the Order did not specify the Name of the Person to whom the Iron was to be delivered, but a verbal Message was left—without saying by whom—that the same was for Mr. *Thornton*; that, in March 1834, application was made, to *Crawshay & Co.*, by *Thornton*, to know the particulars of the Iron which *Crawshay & Co.* held on his Account; and, in consequence thereof, *Routh* called on *Richard Mee Raikes*, (the person then carrying on Business under the Firm of *W. & T. Raikes & Co.*) to ascertain if *Thornton* was the person, entitled to the Iron; and *R. M. Raikes* having informed *Routh* that *Thornton* was the person in whose favour the Order for Delivery had been given, *Routh* made an Entry of the Transfer in the Books of *Crawshay & Co.*, and, at the same time, wrote, to *Thornton*, the Letter of the 8th of March. Now it may be the Fact that the Authority, whatever it was, that the persons constituting the Firm of *W. & T. Raikes & Co.* had over the Iron, had become vested in *R. M. Raikes*; but it is not so stated: and, if it should turn out that *R. M. Raikes*

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had no Authority over the Iron, it would be hard on *Crawshay & Co.* to say that they are bound by a Transfer made by his Direction.

As I understand, however, that this matter has been considered by Mr. Justice *Bosanquet*,* it is but respectful for me, before I decide, to confer with him as to the View which he took of the Case.

THE VICE-CHANCELLOR:

11th May.

I have consulted Mr. Justice *Bosanquet* upon the Question in this Case, and that Learned Judge is of Opinion that there is so much of a Case raiseable, on the Letter of the 8th of March, against *Crawshay & Co.* Personally, as between them and *Thornton*, that *Thornton* ought not to be deprived, by the interference of this Court, of his Right to try the Question at Law, although he may not succeed. This, therefore, is not a proper Case of Interpleader, and the Demurrer must be allowed†.

* A Summons had been taken out under the Interpleader Act, 1 & 2 Will. 4, c. 58.

† Affirmed by The *Lord Chancellor*. See 2 Myl. & Craig, 1.

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UNDER the Settlement on the Marriage of *Edward Gibbon Wakefield*, the Son of *Edward Wakefield*, Lord *Western*, Lord *Berwick*, and *Edward Wakefield* were Trustees of a Sum of Stock standing in the Name of the Accountant-general in Trust in the Cause *Wakefield v. Templer*. The Trustees were empowered, by the Settlement, to invest the Trust Fund in the purchase of Real Estates. In September 1818, *Edward Wakefield* (who was the sole acting Trustee) entered into an Agreement, in his own Name only, with *William White*, the Plaintiff's Father, for the Purchase of an Estate at *Cugley*, in *Gloucestershire*, for 11,000*l.*, and that the Plaintiff and his Father should take a Lease of the Estate agreeably to a Letter which *Edward Wakefield* had written to one of them. This Letter, however, was not produced, nor were the Contents of it stated. Not long after the Agreement was made, the Solicitor for the Vendor was informed, by the Solicitor for the Trustees, that *Edward Wakefield* had entered into the Contract on behalf of himself and his Co-trustees, and that the Purchase-money was to come out of the Court of Chancery. In August 1820, the Purchase-money was raised by Sale of part of the Fund in Court, and paid into Messrs. *Hopkinsons'* Banking House to *Edward Wakefield's* credit. By Indentures of Lease and Release of the 6th and 7th of August 1821, the Estate was conveyed unto and to the use of the Trustees upon the Trusts of the Settlement; and the Vendor acknowledged the Receipt of

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9th & 11th
May.

Vendor and
Purchaser.
Lien.
Notice.

If a Vendor who knows that the Purchase-money is Trust Money, suffers one of the Trustees to retain Part of it, without the knowledge of the Co-trustees or the *cestuis que* Trust, he has no Lien on the Estate for the Part so retained.

Where a Vendor signs a Receipt for the whole Purchase-money, but suffers the Purchaser to retain Part of it, and remains in possession of the Estate as Tenant to the Purchaser; his Possession is no Notice, to a subsequent Purchaser or In-

cumbrancer, of his Lien on the Estate for the Sum retained.

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the whole of the Purchase-money, both in the Body of the Release and by an Indorsement on the back of it: 2,000*l.*, however, part of the Purchase-money, was retained by *Edward Wakefield*. In August 1821, the following Account, in the handwriting of *Edward Wakefield*, was signed by him and the Vendor.

Edward Wakefield in Account with Mr. *William White*.

1821.	Dr.	£.	s.	d.
Aug. 18.	To Cost of an Estate at <i>Cugley</i> ,	11,000	-	-
	To Interest at 4 <i>l.</i> per Cent. on the Value			
	of the Timber, 500 <i>l.</i> for 2 $\frac{1}{2}$ Years	-	50	-
		£. 11,050	-	-

1820.	Cr.	£.	s.	d.
April.	By Cash of Mr. <i>Stokes</i>	-	-	300 - -
	By ditto - - - - -	-	-	268 19 3
June 20.	By ditto - - - - -	-	-	260 17 11
Aug. 18.	By Interest on 11,000 <i>l.</i> at 4 <i>l.</i>			
	per Cent. from 21st August 1820, the			
	day on which the Money was put into			
	a Banker's hands by desire of Mr.			
	<i>White's</i> Solicitor, Mr. <i>Davis</i>	-	-	436 - -
	By an Allowance in consequence of Mr.			
	<i>White's</i> Solicitor, Mr. <i>Davis</i> , having			
	stated that he was prepared to com-			
	plete the Purchase, and insisted that			
	Stock should be sold out for this pur-			
	pose, but which Statement turned out			
	entirely erroneous, as it was not with-			
	out constant urging that he was par-			
	tially ready by the 30th June: the			

	£. s. d.	1835.
Stocks being 67 when Mr. <i>Davis</i>		
forced the Sale, and 77 $\frac{1}{2}$ when a Sale		WHITE
would have taken place but for Mr.		v.
<i>Davis's</i> premature directions to have		WAKEFIELD.
the Stock sold; the difference or loss		
being 1,560 <i>l.</i> - - - - -	664 - -	

1821.

Aug. 18. By Draft on Messrs. *Cribb* - 7,120 2 10

y Amount retained until the remaining Signatures are obtained, and until certain attested Copies of Deeds are delivered and Lease executed and other legal matters are completed; but which it is understood by all Parties can be done very soon, and which Balance it is agreed between *William White* and *Edward Wakefield* shall carry Interest at and after the rate of 4*l.* per Cent., provided Mr. *White* gives two Months' Notice for the payment of the same - 2,000 - -

£.11,050 - -

The Lease referred to in the above Account, was a lease of the Estate for 12 years from the 2d of February 1820, at the Rent of 400*l.*, which the Plaintiff and his father had agreed to accept from *E. G. Wakefield*, the suitable Tenant for Life of the Estate, and under which the Plaintiff was to be the occupying Tenant. A Lease was accordingly prepared and engrossed at the time of the execution of the Conveyance; but neither the Plaintiff nor his Father ever executed the Counterpart. The

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Plaintiff however entered into, and continued in the possession of the Estate upon the Terms of the Lease.

In November 1821 the Plaintiff's Father died; and the Plaintiff was his Heir-at-Law and Administrator.

On the 9th of August 1822, the Plaintiff and *Edward Wakefield* signed the following Memorandum: "It is agreed between Mr. *William White* and *Edward Wakefield*, on account of his Son, *Edward Gibbon Wakefield*, that Mr. *White* will, when Mr. *Wakefield* comes into the country, in October next, to receive the Spring Rents, pay the Rent for *Cugley*, due to *Edward Gibbon Wakefield*; that Mr. *White* will, then, or previous thereto, get up and deliver Copies of the Deeds wanting to complete the *Cugley* Purchase; but that, so long as the 2,000*L*, now in Mr. *Wakefield's* hands, due to the Administrator of the late *William White*, shall remain with him, Mr. *William White* shall not be called upon to execute the *Cugley* Lease, although he will keep the Covenants of it."

In March 1827, *E. Gibbon Wakefield* granted three Annuities to different persons, and devised the Estate, for 99 years determinable on his death, to the Defendant *Few*, the Solicitor of the Annuitants, on certain Trusts for securing the Annuities.

Edward Wakefield, from time to time, made Payments to the Plaintiff on account of the 2,000*L*, amounting, in the whole, to 1,200*L*.

In April 1828, *E. G. Wakefield* advertised some of the Timber on the Estate for Sale; whereupon the Plaintiff applied to him either to abandon the Sale, or

pay to the Plaintiff the Balance of the *Purchase*—remaining unpaid. *E. G. Wakefield*, however, refused in Selling the Timber. On the 30th of June and pending the Dispute respecting the Timber, the Plaintiff wrote to *E. Wakefield*, the following :

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Dear Sir,—I am sorry you could not make it convenient, when in Gloucestershire, to make *Cugley* in person, as I particularly wished to see you, to decide in the Dispute, as I am as averse to Law Proceedings as you are, well knowing the consequences attending them. The felling of the Timber at such a season of the year you must allow sufficient to alarm the feelings of any thinking Person, whose Crops must have been materially Injured. The Candlemas Rent is not due, neither am I prepared to do so, as I am obliged to advance Money, as Executor, to pay Legacies. *If, instead of the Bill for 500 l., you will pay the half-year's due, and the next half-year when due, and take a credit for it, we can balance our Account when we*

until the 2d of February 1829, the Plaintiff paid to *Edward Gibbon Wakefield* and afterwards to the Rent of 400 l. minus the Interest on the unbalance of the 2000 l., and *Edward Wakefield* paid the remainder. In 1828 *Edward Wakefield*, who had been embarrassed in his circumstances, went abroad ; from the 2d of February 1829 down to the 2d of August 1830 inclusive, the Plaintiff, after several Applications made to him by *Few*, paid the whole of the

In August 1830, the Plaintiff, in Answer to one of these Applications, wrote to *Few*, as follows : “ I am sorry you should think me so negligent in answering your

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Letter, and likewise in the payment of the Rent. *The delay has been occasioned in consequence of a Letter I expected to receive from Mr. Wakefield, Senior. If you are aware of my Claim on the Estate, you must, I think, allow it a sufficient excuse for the negligence you think me guilty of.* It is my intention to pay the half-year's Rent, which, after deducting Land-tax, will amount to 199*l.* 4*s.* 3*d.*, on Saturday next; and I hope to make some arrangement with Mr. *Wakefield* for the future payment to prevent any future trouble or dispute."

The Bill was filed, in December 1831, against *Edward Wakefield* (who was out of the Jurisdiction) Lord *Western*, Lord *Berwick*, *Edward Gibbon Wakefield*, *Few*, the Annuityants, and the Children of *E. G. Wakefield* (who were Infants) alleging that the 2,000*l.* were retained, out of the Purchase-money, by *Edward Wakefield* on behalf of himself and his Co-trustees; that all the Conditions on which the 2,000*l.* were retained, had been fulfilled, except the execution of the counterpart of the Lease; that the Plaintiff had been always ready and willing to execute the counterpart on being paid the Balance of the Purchase-money with Interest, and that he ought not to be required to execute the same, until such Payment had been made: that *Edward Wakefield* signed the Account of August 1821 and the Memorandum of August 1822, and made the Payments in respect of the 2,000*l.* on behalf of himself and his Co-trustees: that the Plaintiff, as Administrator to his Father, had a Lien, on the Purchased Premises, for the Balance of the Purchase-money remaining unpaid, with Interest at four per Cent.; and that *Few* and his *cestuisque* Trust had notice of such Lien. The Bill prayed that an Account might be taken of what was Due, to the Plaintiff, in respect of such Balance and Interest, the Plaintiff consenting to give

Credit for the yearly Sum of 400*l.* in respect of his occupation of the Premises; and that the Defendants might pay to the Plaintiff what should be found Due to him; or, in default thereof, that it might be raised by Sale or Mortgage of the purchased Premises.

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The Defendants Lord *Western*, Lord *Berwick* and *Edward Gibbon Wakefield*, by their Answers, denied that *Edward Wakefield* had retained the 2,000*l.* with their knowledge or on behalf of himself and his Co-trustees, and insisted that the 2,000*l.* was a Loan, by the Plaintiff's Father, to *Edward Wakefield*, on his Personal Security.

Few, by his Answer, denied that he had any Notice that *Edward Wakefield* had retained the 2,000*l.* or had any Lien on the Estate; but he admitted that, at the time when the Annuities were granted, he was informed, by *Edward Wakefield's* Solicitor, that the Plaintiff held the Premises under the Lease before referred to, and that only one part thereof had been executed. The Answer of the Annuitants was to the same effect, except that it did not admit that the Annuitants had Notice that the Plaintiff was in possession of the Premises.

The *Solicitor-General* and Mr. *Wood*, for the Plaintiff:

There are no circumstances in this Case, which vary it from the simple case of a Vendor claiming a Lien on an Estate for the Purchase-money remaining unpaid.

Edward Wakefield entered into the Agreement in his own Name only; and, until some time afterwards, no intimation was given, to *White*, the Father, that he was

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acting for other Parties. He was the accredited Agent of his Co-trustees, and was entrusted by them with the whole management of the Transaction, and with the Purchase-money, which was paid to his Banker a year before the Purchase was completed. The circumstance that *White* was informed that the Purchasers were Trustees, is immaterial; for he was not bound to see that they did their duty to their *cestuique* Trust. Nor is it of any importance that *White* had notice that the Money was to come out of the Court of Chancery: it was not to be paid to him by the Court of Chancery. He had to deal with *E. Wakefield* alone: he was not a Party to the Order under which the Money was obtained; and, long before he received it, it had been paid to *Wakefield's* Banker, to his sole Credit. Another circumstance which the Defendants rely on, is that *White* signed a Receipt for the whole of the Purchase-money: but, if any part of the Purchase-money remains unpaid, the Vendor is entitled to a Lien for it, notwithstanding he has signed a Receipt for the whole. *Mackreth v. Symmons* (a), *Hughes v. Kearney* (b), *Toulmin v. Steere* (c). Then it will be argued, from the heading of the Account and from an Expression in the Memorandum of August 1822, that the Plaintiff and his Father adopted *Edward Wakefield* as their Debtor. The Account was drawn up by *Edward Wakefield*: it describes the 2,000*l.* as being retained until the remaining Signatures were obtained and certain attested Copies of Deeds were delivered: so that it treats the 2,000*l.* as so much Purchase-money remaining unpaid. It contains also an Allowance of 664*l.* in consequence of the Stock having been Sold

(a) 15 Ves. 329.

(b) 1 Scho. & Lef. 132.

(c) 3 Mer. 210; and see
 2 Sugd. Vendors, 62, 63.

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at the request of *White's* Solicitor, before the Purchase could be completed. Is it possible to suppose *Wakefield* could mean to represent, to *White*, that he intended to put the 664*l.* into his own Pocket? That it necessarily belonged to *Wakefield* in his character of Trustee; and no Person signing the Account could suppose that he was acting, except as one of the Trustees. It is true that the Memorandum of August 1822, describes the 2,000*l.* as being in Mr. *Wakefield's* hands: so it was, as between *White* and *Wakefield*. *White* entered into the Contract to sell to *Wakefield*; and Money had been in *Wakefield's* hands for a whole year before the Purchase was completed: the Expression, therefore, was correct, and affords no ground for concluding that the Plaintiff treated *Wakefield* as his Debtor. For a series of years the Plaintiff deducted, from his Rent, the Interest on the unpaid Purchase-money, and *Wakefield*, one of the Purchasers, paid it. When *Wakefield* became Insolvent and went abroad, the Plaintiff paid the Rent in full; but he paid it under Protest. In his correspondence with *Few*, he says that he has a claim for Interest on the Purchase-money not paid; and, in his Letter, he says that he has a Claim, not on *Wakefield*, but on the Estate; so that he invariably treated the 664*l.* as so much Purchase-money remaining unpaid; and, in strict conformity to the Agreement of the 9th of August, he has never executed the Lease.

But it will be said that, although the Plaintiff may be entitled to the Lien as against the Trustees and their *visque* Trust, he is not entitled to it as against the Annuitants; for that *White*, by signing the Receipt for the whole of the Purchase-money, enabled *Edward Gibbon Wakefield* to commit a Fraud on the Annuitants. It

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must be remembered, however, that the legal Estate was in the Trustees, and, consequently, *Edward Gibbon Wakefield* and those who claim under him, have equitable Interests only: and, if he has no right to resist the Plaintiff's claim, how can those who claim mere equitable Rights under him, be entitled to stand in a better predicament? Moreover, with respect to Parties who have equitable Rights only, the Rule is: "*qui prior est tempore potior est jure*;" and, therefore, the Plaintiff's Equity, by reason of its Priority alone, must prevail against the Equities of the Annuitants.

Supposing, however, that the Annuitants had had a legal Title, it would not have availed them; for they had notice of the Plaintiff's Lien, inasmuch as *Few*, who was their Solicitor and Trustee, had notice that the Estate was in the Plaintiff's possession: and, where a person buys an Estate which is in the possession of another, he takes it subject to all the Rights, both legal and equitable, of the Party in possession.—[The *Vice-Chancellor*: Do the Annuity-deeds describe the Estate as being in the Plaintiff's possession?—No: but *Few* admits, in his Answer, that, at the time when the Annuities were granted, he was informed, by *E. Wakefield's* Solicitor, that the Plaintiff held the Estate under the Lease.—[The *Vice-Chancellor*: That admission binds *Few* only. In order to fix the Annuitants with Notice of the Fact, you ought to have examined *Few* as a Witness.]

Whether the Annuitants did or did not know that the Plaintiff was in the possession, is immaterial. A person who buys an Estate is bound to inquire in whose pos-

session it is, and what are the Rights of the Party in possession. *Daniels v. Davison* (*d*), *Allen v. Anthony* (*e*). Those Cases were decided, not on the ground of the Purchaser *knowing* who was in possession, but on the ground that the Party was in possession. There is nothing, therefore, which differs the Case of the Annuitants from the Case of the other Defendants.

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Mr. Jacob and Mr. John Romilly for the Defendant Lord Western :

Shortly after the Agreement was made, *White*, the Father, had notice that the Estate was to be paid for with Trust-money, and that it was to come out of the Court of Chancery. He was, therefore, fully aware that he was dealing, for the completion of the Purchase, with Trustees, who could not act except in a manner which the Court of Chancery would approve of. Where a Party is dealing with Trustees, he is bound to see that they do nothing that is not justified by their Trust; and he ought to be still more cautious where he is dealing with their Agent. *Edward Wakefield* appears to have acted as the Agent for his Co-trustees, and also for his Son, *E. G. Wakefield*, the Tenant for Life, and, in the latter character, he entered into the Agreement for the Lease. The Trustees had nothing to do with the Lease: that was to be taken from *E. G. Wakefield* alone.

Where a Vendor is dealing with an Agent, and Part of the Purchase-money is kept back by the Agent, it becomes his private Debt: otherwise the Agent would be able to commit a Fraud upon his Principal. Contemporaneously with the preparation of the Lease, the account was made out, which was, as it purports to be,

(*d*) 16 Ves. 249.

(*e*) 1 Mer. 282.

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an Account between *E. Wakefield* and *White* individually. There is nothing to show that it was made out by *Wakefield* on behalf of any other person. *White* might have brought an Action on it, against *Wakefield* alone, for the Balance, the Interest on which *Wakefield* continued to pay until he became Insolvent. Certain Sums are mentioned in the Account as having been paid in April and June 1820. *White* could not consider that those Sums were paid in execution of the Trust: for Trustees cannot pay any part of the Purchase-money before the Conveyance is executed. Then the 7,120 *l.* is stated to have been paid by draft on Messrs. *Cribb*, and the 2,000 *l.* was to be retained until the execution of the Lease. The Trustees had nothing to do with the Lease: that was the affair of the Tenant of Life. *White*, therefore, could not imagine that *Wakefield* was acting in the character of a Trustee. Again the Money was not to be paid until after Two Months' Notice; and *Wakefield* was the Person to whom that Notice was to be given.

Where an Act is done by a person who fills several characters, the Rule is to ascribe it to that character in which the Party might properly do the act. The Transaction was proper if it was a dealing between *White* and *Wakefield* individually; and, therefore, it ought to be regarded in that point of view. By the Memorandum of August 1822, *Wakefield* stipulated that the Plaintiff should not be called upon to execute the Lease (which was a Lease to be granted by *Edward Gibbon Wakefield*) so long as the 2,000 *l.* remained unpaid. This the Trustees were not justified in doing, and therefore this Memorandum gave further notice to the Plaintiff that *Wakefield* was not dealing as Agent for the Trustees, but either in his own individual character or as Agent for *Edward Gibbon Wakefield*.

In March 1827, *Edward Gibbon Wakefield* demised the Estate to *Few* as a Trustee for the Annuitants ; and the Plaintiff, on being required to pay the Rent in full, did not insist on his right to deduct the Interest, but said that he would write to *Wakefield* on the subject. He, accordingly, wrote to *Wakefield* and told him that he must pay the Interest. *Wakefield* submitted and continued to pay the Interest until he became insolvent. He also paid, at different times, 1,200*l.* in part of the Principal ; and, therefore, he clearly recognized the 2,000*l.* as his own Personal Debt. On the 30th of June 1828, the Plaintiff wrote a Letter to *Wakefield*, from which it appears that Bill Transactions were going on between them : that Letter also shows that the Plaintiff considered *Wakefield* as his Debtor. When *Wakefield* went abroad, *Few* again wrote to the Plaintiff and insisted on his paying the whole of the Rent. The Plaintiff, on that occasion also, ought to have stood on his Right ; but, instead of doing so, he referred to *Wakefield* as the Debtor ; and, for Three Half-years, he paid the whole Rent without a murmur. The Plaintiff, by these acts, (which are wholly inconsistent with his having a Claim on the Estate) has put himself out of Court.

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Mr. *Tennant* for Lord *Berwick*.

Mr. *Koe* for the Children of *Edward Gibbon Wakefield*.

Mr. *Wakefield* and Mr. *Bellasis* for *E. G. Wakefield*.

Mr. *Kindersley* and Mr. *K. Parker* for the Annuitants :

From the Terms of the Account it appears that *White* was dealing with *Wakefield* and discharging the Estate.

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The 2,000 *l.* was to be retained, not only until the Signatures were obtained and the Attested Copies delivered, but also until the Lease should be executed. The Lease however had no connexion with the Purchase. It was to be granted, not by the Trustees, but by the Equitable Tenant for Life under the Settlement. The Account introduces a new Term which varies and, in fact, destroys the Plaintiff's Right to recover the 2,000 *l.* under his Lien, namely, that he shall give Two Months' Notice before he calls for Payment of the Money. For 10 or 12 years he allowed *E. G. Wakefield* to receive 400 *l.* a year, when, at any time, he might have paid himself out of it. After having had that opportunity of paying himself, has he any right to claim the Money as against the Annuitants? He also permitted *E. G. Wakefield* to receive the Money for the Timber: this shows that, instead of paying himself, he preferred keeping *Edward Wakefield* as his Debtor. If he had taken proper Precautions, he might have prevented *E. G. Wakefield* from dealing with the Estate to the prejudice of his Lien; but, instead of doing so, he allowed him to deal with it as he pleased: that was a Fraud on the Annuitants if he meant to set up his Lien.

There is no proof, as against the Annuitants, that they had any Notice of the Plaintiff's Lien. *Few's Answer* cannot be read against them: and, if it could, it would only show that their Trustee had Constructive Notice of the Lien. We admit that Actual Notice to a Trustee, is Constructive Notice to his *Cestui que Trust*; but Constructive Notice to a Trustee, is no Notice whatever to the *Cestui que Trust*. The Case, therefore, as against the Annuitants, totally fails; and the Court will either dismiss the Bill as against them, or declare that they are entitled to priority over the Plaintiff's Claim.

Mr. *Knight* and Mr. *Hayter* for *Few* :

In this Case, the Possession of the Tenant cannot be held to be notice of his Right ; for he has himself signed a Document disclaiming his Right, and, therefore, it was not necessary to ask him any question. If *White* had meant to preserve his Lien, he ought not to have signed the Receipt for the Purchase-money, or, if he did sign it, he ought to have made an Indorsement on the Deed, neutralizing the effect of the Receipt.

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The whole course of Proceeding has been inconsistent with any notion of Lien ; and the Plaintiff, for nearly Three Years, submitted to *Few's* demands, and paid his Rent in full : how then can he set up any Claim as against *Few*?

The *Solicitor-General*, in reply, referred to *Winter v. Lord Anson* (f) in order to show that the Plaintiff's Lien was not affected by the Stipulation that the 2,000*l.* should not be paid until a future time.

The VICE-CHANCELLOR :

This Case has been very fully and ably argued ; and the simple Circumstances of it are that Lord *Western*, Lord *Berwick* and Mr. *Edward Wakefield*, being Trustees of a Fund in this Court, which, under the Settlement on the Marriage of Mr. *Edward Gibbon Wakefield*, was to be laid out in Land. Mr. *Edward Wakefield*, on behalf of himself and his Co-trustees, entered into a Contract with Mr. *White*, the Plaintiff's Father, for the Purchase of an Estate in *Gloucestershire* for 11,000*l.* It is in Evidence, by the Correspondence that took place between the Solicitors of the Parties,

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that Mr. *White* knew that the Money was Trust-money. Mr. *Edward Wakefield*, on behalf of his Son, Mr. *E. G. Wakefield*, the Tenant for Life under the Settlement, made an Arrangement with Mr. *White*, by which the Plaintiff was to become Tenant of the Estate to Mr. *E. G. Wakefield*, at the Rent of 400 *l.* a year. In August 1820 the Purchase-money was raised by Sale of Part of the Stock ; but, owing to some delay on the part of the Vendor, the Purchase was not completed until 1821. In the month of August in that Year, the Estate was conveyed to the Trustees upon the Trusts of the Settlement, and Mr. *White* signed a Receipt, in the usual Form, for the 11,000 *l.* He did not, however, receive the whole of that Sum ; for 2,000 *l.*, part of it, was retained by Mr. *E. Wakefield*. On the 18th of August 1821, an Account was settled between Mr. *Edward Wakefield* and Mr. *White*, which, after noticing certain Sums paid to *White* and a Deduction for the Loss that had been sustained by selling out the Stock at a Time when the Purchase was not ready to be completed, concludes thus : “ By Amount retained until the remaining Signatures are obtained, and until certain Attested Copies of Deeds are delivered and Lease executed, and other Legal Matters are completed, but which it is understood, by all Parties, can be done very soon ; and which Balance it is agreed between *William White* and *Edward Wakefield*, shall carry Interest at and after the rate of 4*l.* per Cent., provided Mr. *White* gives Two Months' Notice for the Payment of the same.”

Now, if any doubt existed as to the nature of the Transaction upon the face of this Account, the subsequent Correspondence shows that it was a Transaction by which *White* agreed that the 2,000 *l.* should remain in the hands of *E. Wakefield*, who should himself pay

erest for it at Four per Cent., and should not be led upon to pay the Principal until after Two Months' tice given to him by *White*.

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This mode of dealing was one which makes this Case er, essentially, from the common case between udor and Purchaser, where, from mistake, or for the venience of the Purchaser, it happens that the Ea- is conveyed without Payment of the Purchase- ney in full: for, as *White* knew that the Estate was be purchased with Trust-money, he ought to have en care that such an Arrangement was made as that

Purchase-money might be safe and forthcoming. t this Transaction is totally different; for the Money is left under the absolute control of *E. Wakefield*: l, as *White* did so deal with one of the Trustees with- the concurrence of the Co-trustees or their *Cestuis Trust*, he cannot be permitted, as against them or Annuitants and their Trustee, to say that he has a t to consider the Estate as virtually mortgaged to him the unpaid Part of the Purchase-money. Therefore essence of the Claim which the Plaintiff makes inst the Estate, totally fails.

Suppose however that it were otherwise, and that re had been a Lien; then the question would be ether, if there were no actual Notice to the Annuitants, y would be bound by the Lien, because theirorney had notice that the Plaintiff was in possession the Estate. The only fact of which they could have l notice, was that the Money was not paid. But as *White* had declared by the Conveyance, in the most mn manner, that he had received all the Money, no n could be expected to inquire whether the Purchase- ney had been paid: and, therefore, if there had been

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any Lien, the Case must have totally failed as against the Annuitants.

My Opinion is that this is not a Case in which the Court ought to recognize that there was any Lien on the Estate for the Purchase-money unpaid.

Bill dismissed with Costs.

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12th May.

ROBERTS v. SCOONES.

Heir. Costs.

In a Suit to establish a Will, the Bill stated that *A.*, one of the Defendants, was the Testator's Heir. *A.* admitted it, and disputed the validity of the Will; upon which an Issue was directed. The Verdict was in favour of the Will. The Plaintiff then discovered that *A.*'s Elder Brother had died, leaving two Daughters, who were still living, as *A.* well knew. The Court refused to give him his Costs, either at Law or in Equity.

THOMAS SCOTT REDFORD, late of *Hawkhurst, Kent*, being seised of Lands, in that County, which were of Gavelkind Tenure, devised all his Real Estates to the Defendant *Scoones*, in Trust to Sell, and, out of the Produce, to pay his Funeral and Testamentary Expenses, Debts and Legacies, and to give the Surplus to the Plaintiff.

The Original Bill stated, in general Terms, that the Testator was seised of considerable Real Estate, consisting of Freehold and Copyhold Lands and other Hereditaments: that he made his Will to the effect before mentioned: that he left *Henry Redford*, of *Sandhurst, Kent*, Labourer, his Heir-at-Law and Customary Heir: that *Henry Redford*, soon afterwards, died Intestate leaving the Defendant, *Thomas Redford*, his Heir at Law and Customary Heir, and, as such, *the Heir at Law and Customary Heir of the Testator*: and it prayed that the Will might be established, and the Trusts performed.

Thomas Redford, in his Answer, stated that the Testator left *Henry Redford*, his, the Defendant's, Father,

Heir at Law and Customary Heir, and that *Henry Ford* afterwards died Intestate, leaving the Defendant his Heir-at-Law and Customary Heir, and, as such, the Heir-at-Law and Customary Heir of the Testator: and he alleged that the Will had been fraudulently obtained.

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At the hearing of the Cause an Issue *Devisavit vel non*, directed to be tried. In the course of the Trial, the Parties, on the recommendation of the Learned Judge, came to the following Compromise: that a Verdict should be entered for the Plaintiff, and that he should pay to the Defendant, *Thomas Redford*, 2,000*l.*

At long afterwards, the Plaintiff discovered that *Thomas Redford* had had an Elder Brother, *Morris Ford*, who died in the Testator's Lifetime, leaving three infant Daughters, *Eliza* and *Harriet*, both of whom were still living, and who were the Co-heirs at Law, and, jointly with *Thomas Redford*, the Co-heirs of the Testator. The Plaintiff thereupon filed a Supplemental Bill against *Eliza* and *Harriet Ford* and the Defendants to the Original Bill, alleging that he made the Compromise in the full faith and confidence that *Thomas Redford* was the Heir at Law and Customary Heir of the Testator: that *Thomas Ford* knew, before the filing of the Original Bill, that *Morris*, his Elder Brother, had left Children, and that he was not the Testator's Heir at Law or his Customary Heir; that he was in habits of intercourse with his Nieces. The Supplemental Bill prayed that the Will might be set aside as well against *Eliza* and *Harriet Redford*, as against *Thomas Redford*, and that the Compromise might be set aside. *Thomas Redford*, in his Answer, admitted that he knew, before the filing of the Original Bill, that *Morris Redford*, his Elder Brother, left the

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Two Children before mentioned, and that they were still living, and that he had occasional intercourse with them: and he submitted to the Judgment of the Court whether they were the Co-heirs at Law, and, jointly with himself, the Co-heirs in Gavelkind of the Testator; and he said that, if they were so, he was wholly ignorant thereof and of their having any Right to the Testator's Estates, at the time of entering into the Compromise, and that he then fully believed that he was the Testator's Sole Heir.

Eliza and *Harriet Redford* disputed the Will on the ground before mentioned.

On the hearing of the Supplemental Cause, another Issue *Devisavit vel non*, was directed. At the Trial, a Verdict was again found for the Plaintiff.

On the Causes coming on for further Directions,

Mr. *Knight* and Mr. *Campbell*, for the Plaintiff, contended that *Thomas Redford* was not entitled to his Costs, because he, knowing that the Plaintiff was ignorant of the state of his Family and that his Elder Brother had left Two Daughters, had falsely stated, in his Answer, that he was the Testator's Heir at Law and Customary Heir, and had put the Plaintiff to the Expense of Two Trials at Law.

Mr. *Bethell*, for *Thomas Redford*, said that the Plaintiff had stated, advisedly, in the Original Bill, that *T. Redford* was the Testator's Heir at Law and Customary Heir: that that Bill did not allege that the Estates were of Gavelkind Tenure; and that, though *T. Redford* knew of the Existence of his Nieces, he did not know that they were the Co-heirs of the Testator or had any Interest in the Estates, but believed himself to be the Sole Heir.

Mr. Wakefield, Mr. Kindersley, Mr. James Russell and Mr. Wood appeared for the other Defendants.

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The Vice-Chancellor said that, as *T. Redford* had thought proper to state, in his Answer to the Original Bill, that he was the Testator's Heir at Law and Customary Heir, although he knew, as he admitted in his Answer to the Supplemental Bill, that his Elder Brother had left Children, he was not entitled to his Costs either at Law or in Equity*.

* The following Cases were referred to in the course of the Argument: *White v. Wilson*, 13 Ves. 87; *Tucker v. Sanger*, Maclel. & Younge, 425. See also Beames on Costs, 94, et seq.

LEWIS v. LANGDON.

1835:
29th and 30th
May.

Partners.
Injunction.

IN and before 1788, *Stephen Brookman* and *Joshua Langdon* carried on the Business of making and selling Lead Pencils, at No. 28, *Great Russell-street, Bloomsbury*, under the Firm of *Brookman & Langdon*. In 1788 *Stephen Brookman* died. In 1798 *Joshua Langdon* died, having, by his Will, appointed *William Langdon* his Executor and made him his Residuary Legatee. In May 1828, *William Langdon* died Intestate, and Administration of his Effects was granted to *Fruzan Langdon*, his Widow. After the deaths of *Stephen Brookman*, *Joshua Langdon* and *William Lang-*

A. & B. carried on the Business of a Pencil-maker, under the Firm of *A. & L.* *A.* died, and *B.* carried on the Business, under the Firm of *B. & Co.*, Successors to

A. & L. *A.*'s Executor, having commenced the same Business, under the Firm of *A. & L.*, an Injunction was granted to restrain him from using that Firm, until the Right should have been tried at Law.

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don, the Business was carried on under the same Firm and at the same Place, by *Joshua Langdon*, *William Langdon* and *Fruzan Langdon* in succession. In June 1828, *Fruzan Langdon* took into Partnership with her the Plaintiff, *James Lewis*, (who was the Half-brother of the Intestate, and was then considered to be his Sole Next of Kin), and they carried on the Business under the same Firm and at the same Place. During that Partnership *William Tobias Langdon* claimed to be the Son and Sole Next of Kin of the Intestate, and divers Legal Proceedings were had, with respect to such Claim, between *William Tobias Langdon* and *Fruzan Langdon* and *James Lewis*. In July 1832 they came to an Agreement in writing for the Settlement of their Disputes, whereby it was agreed that the Business of *William Langdon* and the Profits arisen from the same since his decease, should belong to *Fruzan Langdon* and *James Lewis*. In November 1834 *Fruzan Langdon* died, having, by her Will, appointed the Defendant, *Augustus Langdon*, and Two other persons, her Executors. After the death of *Fruzan Langdon*, *James Lewis* took the Plaintiff, *G. E. Warren*, into Partnership with him, and they carried on the Business at No. 58, *Great Russell-street*, under the Firm of *James Lewis & Co.*, Successors to *Brookman & Langdon*. In January 1835 the Defendant, *Augustus Langdon*, commenced carrying on the Business of making and selling Lead Pencils, under the Firm of *Brookman & Langdon*, at No. 27, *Great Russell-street*.

In May 1835 the Bill was filed, praying that the Defendant might be restrained from marking any Pencils with the Name or Firm of *Brookman & Langdon*, and from using the same Name or Firm in carrying on his Business, and that he might account for and pay, to the

Plaintiffs, the Profits made by him by using that Name or Firm.

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The Plaintiffs now moved for the Injunction.

Mr. Knight and *Mr. Duckworth*, in support of the Motion :

The Right to use the Designation of a Partnership, ranges itself under the head of Goodwill. Goodwill survives, and the Personal Representative of the late Partner has nothing to do with it. Consequently, on the death of *Fruzan Langdon*, the Right to use the Name of the late Partnership, vested in *Lewis*, the Surviving Partner. We do not, however, disclaim any aid that may be derived from the Agreement of July 1832, whereby the Business of *William Langdon* became the Property of *Fruzan Langdon* and *James Lewis*. If *Augustus Langdon* chooses to deal in Pencils, he must deal in his own Name.

Sir William Horne, *Mr. Wakefield*, and *Mr. Lovat*, for the Defendant :

The Law as to Goodwill has been mis-stated by the Counsel for the Plaintiffs. But we deny that the Right in question is Goodwill : it is Stock in Trade ; and, on the death of one Partner, it does not belong to the Survivor, but the whole must be Sold, and the Proceeds divided between the Surviving Partner and the Personal Representative of the deceased Partner. The Plaintiffs, although they insist that we ought not to use the Name of *Brookman & Langdon*, do not use it themselves : they call themselves, "Successors to *Brookman & Langdon*." On the death of *Fruzan Langdon*, there being no longer either of the Names in the firm, *Lewis* did not think himself at liberty to continue to use the Style of *Brook-*

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after the death of Mrs. *Langdon*, had carried on the business and sold Pencils under the Name of *J. & Langdon*, and a Stranger had sold Pencils under the Name, he would have had a Right of Action against the Stranger. Will not the Question in this Case be the meaning of the Expression, in the Agreement, that the Business of *William Langdon* shall belong to *Langdon* and *James Lewis*?]—The Agreement gives the thing but the liberty to carry on the Business and retain the Profits.

THE VICE-CHANCELLOR :

The question in this Case depends on the meaning of the Name of the Surviving Partner, to carry on the Business under the Name of the Partnership.

Lord *Eldon*, certainly, has expressed a doubt in the Case of *Crawshay v. Collins (a)*, upon what is understood to be the Proposition laid down, in the Case of *Rosslyn*, in the Case of *Hammond v. Douglas*, is true that the Question might have been, to some degree, whether, having regard to what had taken place, the Money should be considered to belong to one rather than to another : and it is, also, observed, that Lord *Eldon* might have been throwing out his observations with reference to a supposed Connexion

the Partnership, then this consequence must follow, namely, that the Surviving Partner must be under an obligation to carry on the Trade for some time after his Partner's death, in order that the thing which is said to be Saleable, may be preserved until it can be sold.

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—
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v.
LANGDON.

If a Partnership were carried on between *A.* and *B.* under the name of *Smith & Co.*, and the surviving Partner chose to discontinue the Business and to write to the Customers and say that his Partner was dead, and that the Business was at an end, the effect would be that that which is said to be saleable would cease to exist. Now what Power is there in a Court of Equity, to compel a Partner to carry on a Trade after the death of his Co-partner, merely that, at a future time, the Goodwill, as it is called, may be sold? It is plain that, unless there is such a power in this Court, it must be in the discretion of the Surviving Partner to determine what shall be done with the Goodwill; and, if that is the case, it must be his Property.

I cannot but think, when two Partners carry on a Business in Partnership together under a given Name, that, during the Partnership, it is the joint Right of them both to carry on the Business under that Name, and that, upon the death of one of them, the Right which they before had jointly, becomes the separate Right of the Survivor.

My Opinion, therefore, is that Mr. *Lewis*, by becoming the Surviving Partner of Mrs. *Langdon*, had, in himself, the Right to use, either simply or in a modified way, the Firm of *Brookman & Langdon* under which the Partnership Business was agreed to be carried on by virtue of a Clause which I find in the Agreement:

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and he cannot be said to have abandoned that Right for he has made use of the Firm as subsidiary to the New Partnership which he is now carrying on under the Name of *James Lewis & Co., Successors to Brookman & Langdon*, and thereby he connects himself with the former Partnership of *Brookman & Langdon*. As, therefore, Mr. *Lewis* has never abandoned the Right which accrued to him on the death of Mrs. *Langdon*, the consequence is, that Mr. *A. Langdon*, who is the Executor only of Mrs. *Langdon*, has no right to use the Partnership Firm for his own benefit; and, therefore, I shall immediately grant an Injunction to restrain him from using that Firm in carrying on his Business. But, if the Parties wish to have the Question decided in a Court of Law, I will direct an Action to be brought by Mr. *Lewis* against Mr. *A. Langdon* for that purpose*.

* The Parties, afterwards, came to a Compromise, and the Action was not tried.

LEWIS v. JOHN.

1835:
30th May.

Practice.
Process.

THE Sheriff had taken the Defendant on an Attachment for want of Answer; and, shortly afterwards, the Defendant was rescued.

The Defendant, after having been taken on an Attachment for want of Answer, was rescued. The Serjeant-at-Arms was directed to go.

The Vice-Chancellor, on the Motion of Mr. *Spurrier* (who referred to *Frederick v. David*), (a) ordered the Serjeant-at-Arms to go, saying that it amounted to a return of *Non est inventus*.

(a) 1 Vernon, Raithby's edit., p. 344, note (1).

BATES v. BONNOR.

1835:
2d June.

MORTGAGEE purchased part of the Mortgaged
His Principal and Interest, calculated up to
the 24th of March, exceeded the Purchase-money; and
he Petitioned to be let into Possession of the pur-
chased Premises, from Christmas preceding.

*Vendor and
Purchaser.
Mortgagee.*

Tr. Knight, in support of the Petition.

Tr. Temple, *contra*.

Vice-Chancellor held that the Mortgagee was
ordered to be let into Possession from Christmas, and
an Order accordingly.

A Mortgagee
purchased Part
of the Mort-
gaged Estate.
His Principal
and Interest,
calculated up to
the 24th of
March, exceed-
ed the Purchase-
money. He was
let into Posse-
sion from the
preceding
Christmas.

CRAWLEY v. CRAWLEY.

1835:
9th June.

ANNA KEET, by her Will dated the 3d of
1829, gave to such of her Four Great Nephews
Henry, Arthur and Philip Crawley as should
or attain the age of 21 Years, the Sum of 2,000*l*.

*Administration
Annuity.
Residue.
Tenant for Life.*

Where an Annuity for a Term of Years forms Part of a Residue, the
Executors, until they can sell it, must invest the Payments, and the
Interest of the Investments will belong to the Tenant for Life of the
Residue.

Where Sums are set apart to answer Contingent Legacies, the In-
terest of them, until the Contingency happens, is part of the *Income*
of the Residue.

Where the Interest of a Legacy is directed to be accumulated be-
yond the legal Period, the Interest of the Legacy and Accumula-
tions, after that Period and until the time of payment, is part of the
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each, to be paid to them respectively if and when they should respectively attain that age: and, after devising certain Real Estates and giving a Legacy of 8,000*l.* in Trust for her Great Nephew, *Arthur Crawley*, in case he should live to attain 25, with directions for the accumulation of the Interest thereof in the meantime, she gave to Trustees the further Sum of 8,000 *l.*, upon Trust to invest the same in the Funds, and to receive the Dividends thereof and to invest the same in the Funds, so as the same might accumulate, by way of Compound Interest, until her Great Nephew, *Philip Crawley*, should attain 25, and, when he should have attained that age, in Trust to transfer the 8,000*l.* and the accumulations thereof to him: and she declared that, in case *Philip Crawley* should die under that age, the 8,000 *l.* and Accumulations should fall into her Residuary Personal Estate; and she gave the Residue of her Personal Estate to the Trustees in Trust, as to one Moiety, for the Plaintiff for life, with Remainder to his Children, and, as to the other Moiety, in Trust for the Defendant, *Sarah Moore Halsey* for life, with Remainder to her Daughters.

The Testatrix died in July 1830.

The Suit was instituted for the Administration of the Testatrix's Estate. One question in the Cause was, in what manner a redeemable Annuity of 400 *l.* granted to the Testatrix for 60 years, in 1824, and which the Executors had been unable to sell, was to be dealt with. The other questions were whether, until the four Legacies of 2,000*l.* each should become payable, the Interest of the Sums set apart to answer those Legacies would belong to the Tenants for Life of the Residue, or would form part of the Capital of the Residue: and whether, as

Philip Crawley would not attain 25 until the 25th of November 1852, which would be more than 21 years after the Testatrix's decease, the Interest to accrue, on the 8,000 *l.* and its accumulations, between the expiration of the 21 years and the time when that Legacy would be payable, would belong to the Tenants for Life of the Residue, or would form part of the Capital of it.

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Mr. Knight and *Mr. F. Moore* appeared for the Plaintiff.

Mr. Kindersley, *Mr. Wigram*, *Mr. Jacob*, *Mr. Simons*, *Mr. Walker* and *Mr. G. Richards*, for the Defendants.

The *Vice-Chancellor* said that the Executors, until they could sell the Annuity, must invest the Payments of it, and that the Interest of the Investments would be payable to the Tenants for Life of the Residue, and the Capital would form part of the Capital of it: that the Interest to accrue on the four Legacies of 2,000 *l.* each, until those Legacies should become payable, formed part of the Income of the Residue and was payable to the Persons entitled to receive the Interest of the Residue under the Trusts of the Will; and that the Trust for accumulating the Interest of the 8,000 *l.* given to *Philip Crawley*, was good for 21 years after the Testatrix's death, but was void for the Excess beyond that period; that such Interest ought to be accumulated until the expiration of the 21 years, or until the 8,000 *l.* should fall into the Residue under the Trusts of the Will; and that the Interest to accrue from the expiration of the 21 years until the 8,000 *l.* should become payable or fall into the Residue, and also the Interest to accrue, during the same period, from the Accumulations which, at the end of the 21 years, should have been made of the Interest of the 8,000 *l.*, would form part of the Capital of the Residue.

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Construction.

Testator gave the Residue of his Estate to Two Trustees, in Trust, out of the Produce, to invest 4,000 *l.* in the Funds, in Trust for his Granddaughter for her life, and, after her death, for her Children, and, on failure of Children, he directed that the Capital should fall into the Residue. By a Codicil, reciting that he had, by his Will, given to the Two Trustees, in Trust for his Granddaughter, 4,000 *l.* Five per Cents. standing in his Name, and that he was desirous that such Trust should be executed by Three Persons, he appointed another Person to be a Co-trustee and Guardian of his Granddaughter jointly with the Two named in his Will; and he directed that his said Trustees *should transfer* the said Stock to his Granddaughter, free from all Deductions. Held that the Testator did not intend to give 4,000 *l.* Stock to his Granddaughter absolutely, but merely that the Trusts declared by his Will of the 4,000 *l.*, should be performed by Three Persons instead of Two.

BARRY v. CRUNDALL.

CHRISTOPHER KEATING, by his Will dated the 4th of March 1818, gave all the Residue and Remainder of his Real and Personal Estate, to *Robert Crundall* and *George Neale*, their Executors, Administrators and Assigns, upon Trust, forthwith or as soon as conveniently could be after his decease, to receive, call in and convert the same into Money, and to invest the Sum of 4,000 *l.* of lawful Money of *Great Britain*, out of the Produce arising from his said Real and Personal Estate, in their Joint Names, in the Purchase of a competent Share or competent Shares in the Public Stocks or Funds, and to stand possessed of the said principal Sum of 4,000 *l.* until the same should be invested as aforesaid, and of the Interest and Proceeds thereof, and of the Stocks, Funds, or Securities in or upon which the same should be invested, and of the Interest, Dividends and Produce thereof, upon Trust to pay, apply and dispose of such Part, Share and Proportion of the Interest, Dividends and Annual Proceeds of the said principal Sum of 4,000 *l.* and of the Stocks, Funds and Securities in which the same should be invested, as they or the Survivor of them should think proper, for the Maintenance, Education, Benefit and Advancement of his

and daughter, *Emeline Sarah Barry*, Daughter of his daughter *Sarah Barry* and of the Plaintiff, her then husband, until such time as she should attain 21 years, be married with the consent of her Mother, or die, in the meantime, upon Trust to lay out and invest Surplus of such Interest, Dividends and Annual Proceeds, from time to time, in or upon the same or the Stocks, Funds or Securities, and to pay and apply Interest, Dividends and Annual Proceeds of the Stocks, Funds or Securities in which such Surplus should from time to time be invested, in the same manner and for the same purposes as the Interest, Dividends and Annual Proceeds of the Stocks, Funds or Securities in or upon which the said Sum of 4,000 *l.* should be invested, were directed to be applied; and he directed that when and as soon as *Emeline Sarah Barry* should attain 21 or marry with such consent as aforesaid, then his said trustees should stand possessed of the said principal sum of 4,000 *l.*, and of the Stocks, Funds or Securities upon which the same should be invested, and of all in the Accumulations of the said Surplus Interest, Dividends and Proceeds as aforesaid, in Trust to pay Dividends, Interest and Annual Proceeds thereof, from time to time when and as the same should become due and payable, into the proper hands of his said granddaughter, or into the hands of such Person or Persons as she, notwithstanding her coverture, by any deed or writing under her hand, should, from time to time, but not by way of anticipation, appoint to receive the same during her natural Life, to the intent that the same might be for her sole and separate use during her natural Life, and might not be subject to the Debts, Control, Disposition or Engagement of any Person with whom she might happen to intermarry: and his Will was that, in case his said granddaughter should, at any

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time, intermarry with such consent as aforesaid, (in the event of her intermarrying before she should attain the age of 21 years,) and should depart this Life in the lifetime of her Husband, then and in such case he thereby directed that, after the decease of the said *Emeline Sarah Barry*, his said Trustees should thenceforth stand and be possessed of the said principal Sum of 4,000 £, and of the Stocks, Funds or Securities in or upon which the same might be invested, and of and in the Accumulations of the said Surplus Interest, Dividends and Annual Proceeds as aforesaid, in Trust to pay the Interest, Dividends and Annual Proceeds, from time to time, when and as the same should become payable, into the proper hands of such Person with whom his said Granddaughter might happen to intermarry with such consent as aforesaid, (in the event of her intermarrying before she should attain the age of 21), and who might survive his said Granddaughter, for his Life, and, after the decease of his said Granddaughter and the Person with whom she might happen to intermarry with such consent as aforesaid, (in the event of her marrying before she should attain 21,) and the Survivor of them, then he thereby declared that his Trustees should, thenceforth, stand possessed of the principal Sum of 4,000 £. and of the Stocks, Funds or Securities in or upon which the same might be invested, and of and in the Accumulations of the said Surplus of the said Interest, Dividends and Proceeds as aforesaid, in Trust to pay, transfer and assign the same equally between and amongst all and every the Legitimate Child and Children of his said Granddaughter, such Shares to be a Vested Interest in Sons at 21, or, being Daughters, at that age or Marriage, and to be paid, assigned and transferred to such Child and Children respectively at the said said age, days or times, if the same should happen after the decease of his

said Granddaughter, but if before, then within Three Months after her decease, with benefit of Survivorship amongst such Children; and in case there should be no such Child or Children lawfully begotten or to be begotten on the Body of his said Granddaughter at the time of her Decease, or with which she might be *enseint* at the time of her Decease, who should live to become entitled thereto, then, immediately after the decease of his said Granddaughter and the Person with whom she might happen to intermarry with such consent as aforesaid, (in the event of her intermarrying before she should attain 21,) or of the Survivor of them, and failure of such Child or Children, the said Testator directed that his said Trustees should stand possessed of the said principal Sum of 4,000 £, and the Stocks, Funds or Securities in or upon which the same might be invested and the accumulations aforesaid, in Trust to be applied and disposed of in the same manner and for the same purposes as were thereafter declared concerning the Residue and Remainder of his Real and Personal Estate. Provided always, that in case his said Granddaughter should, before she should attain 21, marry without the consent of her Mother, then and in that case the Trustees, immediately after such Marriage without such consent as aforesaid, should stand possessed of the said principal Sum of 4,000 £. and the Stocks, Funds and Securities in or upon which the same should be invested and the Accumulations thereof aforesaid, in Trust to be applied and disposed of in the same manner and for the same purposes as were thereafter declared concerning the Residue and Remainder of his Real and Personal Estate.

The Testator made a Codicil, dated the 24th of May 1820, and in the following words: "Whereas I have,

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by my last Will hereunto annexed, given and bequeathed unto *Robert Crundall* and *George Neale*, in Trust for my Granddaughter *Emeline Sarah Barry*, 4,000*l.* Five per Cent. Navy Annuities standing in my Name in the Books of the Governor and Company of the Bank of England, *and being desirous that such Trust should be executed by Three Persons*, I do hereby nominate, constitute and appoint *William Murray*, of the Theatre Royal Covent Garden, a Co-trustee and Guardian of my said Granddaughter jointly with the said *Robert Crundall* and *George Neale*; and I give and bequeath to the said *William Murray* the Sum of 10*l.*: and it is my Will that my said Trustees *shall and do Transfer the said Stock to my said Granddaughter*, free and clear of all Deductions; and that all Testamentary and other Expenses in the Execution of the Trusts of my said Will and this Codicil, shall be discharged out of the Residue of my Estate."

The Testator died on the 2d of June 1820, leaving his Daughter, *Sarah Barry*, and his Granddaughter *Emeline Sarah Barry*, who was then an Infant, him surviving.

The Testator, at the Date of the Codicil and at his death, had 10,000*l.* Navy Five per Cents. standing in his Name.

Sarah Barry died in October 1824. In October 1825 *Emeline Sarah Barry* died an Infant and unmarried, and the Plaintiff took out Administration to her.

The Bill prayed for a Declaration that, according to the true construction of the Will and Codicil taken together, *Emeline Sarah Barry* was entitled, *absolutely*,

as a Legacy of 4,000*l.*, or that, according to the true construction of the Codicil, she was absolutely entitled to a Legacy of 4,000 *l.* Navy Five per Cents.

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The Defendant (who had become entitled to the Testator's Residuary Estate) put in a general Demurrer.

Mr. Knight and Mr. Wilbraham, for the Defendant:

If, as we contend, the Bequest in the Will is not affected by the Codicil, the Defendant is entitled. The Testator uses this expression in the Codicil: "And being desirous that such Trust," that is, the Trust in the Will, "should be executed by three Persons:" and, accordingly, he appoints *Murray* to perform that Trust jointly with the two Trustees named in his Will. The Plaintiff's Counsel will rely on the direction to transfer the Stock: but that is merely an inaccurate expression used by an unprofessional Person in preparing a Codicil. There is a total absence of intention to change any Disposition made by the Will.

The Solicitor-General, Mr. Wigram and Mr. Elmsley, for the Plaintiff:

There is no Evidence that the Codicil was prepared by an unprofessional Person. The Legacy given by the Will, was 4,000*l.* in Money; the Legacy given by the Codicil, is 4,000 *l.* Stock: therefore the Testator had no distinct recollection of what he had done by his Will. He merely recollected that he had given a Legacy of something to the amount of 4,000 *l.*, on certain trusts for the benefit of his Granddaughter. She was

Infant: and he directs *Murray* to be added as a trustee: and then he says: "My Will is that my said trustees do transfer the said Stock to my said Granddaughter." Now, according to the Will, that Trust

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never could arise: the Trustees never could have to pay the 4,000 *l.* to the Granddaughter, under the Trusts of the Will. Therefore, the Testator clearly manifests, by the Codicil, an Intention that the Trustees should transfer 4,000 *l.* Stock to his Granddaughter. What right has the Court to infer, against the express words of the Codicil, that the Trustees are never to transfer the Fund to the Granddaughter?—[The *Vice-Chancellor*: If you stand on the words of the Codicil alone, nothing was to be transferred, to the Granddaughter, but the 4,000 *l.* Stock given by the Will. Now no Stock was given by the Will.]—The Codicil supersedes the Trusts of the Will: the recital in it amounts to a substantive Bequest. The Testator must have known what was meant by transferring the Stock to his Granddaughter. Why is not the Court to give effect to a clear Intention, because there was a different Intention at another time? The words: “free and clear of all deductions,” exempt the Legacy from Duty, and show that an absolute Gift was intended. Are not those words to have their operation? If they are, why are not the other words in the Codicil, to have their proper effect? The Court never rejects words, unless it is absolutely compelled to do so. If the Codicil had stopped at the words, “*George Neale*,” it would have done everything that the Defendant’s Counsel say that it has done.—[The *Vice-Chancellor*: It would be unreasonable to suppose that the Testator would have given the Fund to three Trustees, if he had intended it to be immediately transferred to his Granddaughter.]—She was an Infant, and he appoints them her Guardians.

The VICE-CHANCELLOR :

If you take the Codicil literally and by itself, the Granddaughter could not take anything; for the Fund

which it directs the Trustees to transfer to her, is, "the said Stock," that is, the 4,000 *l.* Stock given by the Will: but there is no mention of this Stock in the Will; and, therefore, you cannot construe the Codicil literally, but must look at the Will. Now the Testator does not, by his Will, give to his Trustees any Sum of 4,000 *l.*, but he gives them all the rest, residue and remainder of his Real and Personal Estate, and directs them, out of the produce of it, to invest the Sum of 4,000 *l.* in the Funds, and to apply such part of the Dividends as they should think proper, for the Maintenance and Education of his Granddaughter, until she should attain 21 or marry with the consent of her Mother, or die, and, on her attaining 21, or marrying with such consent as aforesaid, to stand possessed of the 4,000 *l.* or the Stocks, Funds or Securities in which it should be invested, in trust for her separate use, for her life; and, in case she should marry under 21, with such consent as aforesaid, or die in the lifetime of her Husband, then to pay the Dividends to her Husband for his life, and, after the decease of the Survivor of them, to pay, transfer and assign the Capital equally amongst her Children; and, in failure of Children, the Testator directs that the Capital shall fall into his Residuary Estate.

Then, by the Codicil, the Testator says: "Whereas I have, by my last Will hereunto annexed, given and bequeathed, unto *Robert Crundall* and *George Neale*, in trust for my said Granddaughter, *Emeline Sarah Barry*, 100 *l.* Five per cent. Navy Annuities standing in my name in the Books of the Governor and Company of the Bank of England, and being desirous that such trust should be executed by three Persons; I do hereby nominate, constitute and appoint *William Murray*, of the Theatre Royal Covent Garden, a Co-trustee

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and Guardian of my said Granddaughter jointly the said *Robert Crundall* and *George Neale*: and I and bequeath to the said *William Murray* the Sum of 10 l.: and it is my Will that my said Trustees shall do transfer the said Stock to my said Granddaughter. Now it is clear that these words cannot be construed literally. And then the question arises whether, as a Testator sets out, in his Codicil, with an imperfection to the Gift to his Granddaughter, but clearly that his Intention was that the Trust should be executed by Three Persons instead of Two, you are not bound to conclude that that was the purpose which he intended to effect, and not to give, to his Granddaughter, a sum of 4,000 l. Stock which he had never before thought

The Demurrer ought, therefore, to be allowed. although, in my Opinion, there could be scarcely any doubt upon the question, yet I think that there is sufficient to make the Testator's Estate bear the Cost.

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9th & 10th
June
and 7th July.

*Equitable
Mortgage.
Statute of
Limitations.*

BROCKLEHURST v. JESSOP.

ON the 22d of June 1816, *E. Dickens*, a Trader, indebted to the Plaintiffs, who were Bankers and partners, deposited with them the Title Deeds of the Estate, of which he was seised in Fee, as a security for the Debt. The Debt having increased, *Dickens*

If an Equitable Mortgagee enters into the receipt of the Rents of the mortgaged Estate, such Receipt is, *prima facie*, a Payment within the meaning of the Proviso in the Statute of Limitations.

An Equitable Mortgagee, if the Mortgagor is dead, is entitled to have the Estate sold, and the Proceeds applied in payment of his Debt, and to stand as a Creditor, for the Balance (if any) on the general Assets of the Mortgagor. *Semble.*

9th of May 1820, deposited with the Plaintiffs the Deeds of another Estate, and, on each occasion, delivered to them a Memorandum signed by him, declaring the purposes for which the Deposit was made. In December 1822 he died Intestate. The Defendants were his Co-heirs: one of them was an infant; and another of them took out Administration to him. In 1824 the Plaintiffs entered into the receipt of Rents of part of the Estates to which the Deeds related.

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In March 1832, the Bill was filed, alleging, amongst other things, that the Plaintiffs had placed the amount of the Rents received by them to the Credit of the Intestate's Estate, but that the same had not been nearly sufficient to keep down the Interest on the Debt; and praying that the Plaintiffs might be declared to have a specific Lien, for their Debt, on the Estates; that the Estates might be sold and the Produce applied in payment of their Debt and Costs; and that the deficiency, if any, might be raised and paid to the Plaintiffs out of the other Real Estates and the Personal Estate of the Intestate, rateably with his other Creditors, and that his Real and Personal Assets might be administered.

The question was whether the Suit was not barred by the Statute of Limitations (9 Geo. 4, c. 14) so far, at least, as it sought to make the Intestate's general Estate liable to the Plaintiffs' demand.

Another question was whether the Plaintiffs were entitled to a Decree for sale of the Estates covered by their Lien.

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Mr. *Knight* and Mr. *Koe*, for the Plaintiffs, contended, first, that the receipt of Rent by the Plaintiffs, was equivalent to part payment of what was due to them; and, therefore, that the Case came within the proviso in the first section of the Statute, which provides that nothing therein contained shall alter, take away, or lessen the effect of any payment of any Principal or Interest made by any person whatsoever.

Secondly: that an Equitable Mortgagee is entitled, where the Mortgagor is dead, to have the Estate covered by his Lien sold, and the Proceeds applied, as far as they will extend, in payment of his Debt, and to be paid the Balance out of the general Assets of the Mortgagor, rateably with his other Creditors. *Harris v. Harris* (a), *Daniel v. Shipwith* (b), *Pain v. Smith* (c): that *Parker v. Housefield* (d) related only to the question whether the Six Months ought to be allowed for payment of the Principal and Interest, and that it did not apply to a Case where the Depositor was dead and the Bill was filed for a general administration of his Assets: that, where the Mortgagor was dead, a Mortgagee, whether legal or equitable, might file a Bill for sale of the Estate, retaining his priority.

(a) 3 Atk. 722.

(b) 2 Bro. C. C. 155.

(c) 2 Myl. & Keen, 417.

(d) Ibid. 419; see 422. The *Vice-Chancellor* was furnished, by the Registrar, with Extracts from *Reg. Lib.* of the Decrees referred to in the Cases cited, and also in *Smith v. Nelson*, *Hiern v. Mill*, and *Monkhouse v. The Corporation of Bedford*. In the two last-mentioned Cases the Decree was for a Foreclosure and an absolute Conveyance. See Seton on Decrees, 178, 179, 180; 13 Ves. 114; 17 Ves. 380.

Mr. Jacob, Mr. Parker, Mr. E. Montagu and
Mr. Webster, for the Defendants :

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The Debt was a mere simple Contract Debt. It was created by a deposit of Deeds, but not by any Instrument under Seal. We admit that the Lien subsists; but that the Plaintiffs may obtain payment out of the mortgaged Estates. *Higgins v. Scott* (e), *Spears v. Williams* (f). But their remedies as Creditors, are barred by the Statute. The Plaintiffs say that, since the death of the Mortgagor, they have been in receipt of the Rents out of the Mortgaged Estates, and that that is a payment which keeps the Debt alive. But, in order to have that effect, the Payment must be made either by the Party liable to pay or on his account. *Williams v. Williams* (g). The Defendants have done nothing to prevent the taking of the Rents in payment: they have been perfectly passive. The Plaintiffs say that they have placed the amount of the Rents received by them, to the Credit of the Intestate's Estate; that is, in their own Books: not that Accounts have been kept between them and the Parties entitled to the Estates.

An equitable Mortgagee is not entitled to a Sale, except by consent. The only relief that he can obtain by himself, is a Foreclosure. *Parker v. Housefield*. A Mortgagee who has a Bond and Covenant, may file a Petition for a Bill, after the death of the Mortgagor, praying for a Sale of the Mortgaged Estate and that the proceeds may be applied in payment of his Debt, and that he may be paid the deficiency out of the general assets of the Testator rateably with the other Creditors: in that case, the Mortgagee is a general Creditor,

² Barn. & Adol. 413.

(g) ² Crompt. Mees. &

³ Espin. N. P. C. 81. Roscoe, 45.

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by virtue of his Bond and Covenant (*h*). But, when the Mortgagee has no security for his Debt except a deposit of Deeds, he has no right to stand as a Creditor against the general Assets of the Depositor, but must rely solely, on his remedy as Mortgagee. Besides, in this Case, the Bill is not filed, by the Plaintiffs, on behalf of themselves and the other Creditors of the Intestate.

The VICE-CHANCELLOR :

The Decrees with which the Registrar has furnished me, show that the Decree in *Pain v. Smith* is manifestly wrong.

I cannot but think that, where the Mortgagor is the Equitable Mortgagee has a right to have the Estate affected by his Lien, sold, and the Proceeds applied in payment of his Debt, and, if there is any Balance remaining due to him, to stand in the place of a general Creditor in respect of it.

In this Case, it has been said that the remedy of the Plaintiffs, as general Creditors, if they ever had it, has been barred by the Statute of Limitations, and that the receipt of Rent by them is not a payment within the meaning of the proviso in that Statute. But my Opinion is that, if an Equitable Mortgagee enters into possession of an Estate and receives the Rents, such receipt ought, *prima facie*, to be taken as payment of either of the Principal or Interest of his Debt, in any case may be.

In order then to determine whether the Plaintiffs are entitled to stand in the situation of Creditors, and

(*h*) See Seton on Decrees, 173, 174.

ently of their right as Mortgagees, it is necessary that the circumstances under which they took Possession, should be ascertained, and, more especially, as one of the Defendants is an Infant, and some of the other Defendants do not explicitly admit the fact. The proper course, therefore, is to direct an Inquiry as to the taking Possession and receipt of Rents; and, if it should turn out that the Plaintiffs' Debt is preserved, so as to make them Creditors on the general Assets of the Intestate, they may apply to amend their Bill by making it a Bill on behalf of themselves and the other Creditors of the Intestate (i).

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Declare that the Plaintiffs, by virtue of the Memorandums of the 22d of June 1816 and the 9th of May 1820, and of the Deposits of the Deeds accompanying the said Memorandums, are entitled to be considered as Equitable Mortgagees of the Estates and Premises in the said Deeds mentioned, in respect whereof the said Deposits were made: Refer it to the *Master* to inquire and state the amount of the Debt now due and owing to the Plaintiffs, as such Equitable Mortgagees, on the said Deposits: and let the *Master* take an account of what has been received, on account of the Rents and profits of the said Estates or any part thereof, by the said Plaintiffs or any or either of them, or by any person or persons, &c.: and let the said *Master* inquire and state to the Court at what time and under what circumstances the Plaintiffs took Possession of the said Estates and Premises or any and what part thereof, &c.

(i) See *Trotter v. Trotter*, ante, Vol. V., p. 383.

UPPERTON v. HARRISON.

1835:
12th June.

*Mortgagee.
Costs.*

A first Mortgagee filed a Bill against the Mortgagor and subsequent Mortgagees for a Foreclosure, but, at the Hearing, he consented to a Sale. The Proceeds being insufficient to pay the Plaintiff his Principal and Interest, the Court refused to give the Defendants their Costs, and directed the whole Fund to be transferred to the Plaintiff.

THE Plaintiff was the first Mortgagee of certain Leasehold Houses at *Worthing* in *Sussex*. The Bill was filed against the Mortgagor and the subsequent Mortgagees, for a Foreclosure. At the hearing, the Plaintiff consented to a Decree for Sale of the Mortgaged Premises. The Proceeds being insufficient to pay the Principal and Interest due to the Plaintiff, the question on the Hearing for further Directions, was whether the whole Fund ought to be paid to the Plaintiff, or, whether the Costs of the Plaintiff and Defendants ought, in the first place, to be paid out of it.

Mr. *Treslove* and Mr. *Alfrey*, for the Plaintiff, said that, where a Sale is decreed in a Suit by a Mortgagee against the Mortgagor and subsequent Mortgagees, the practice of the Court is to direct each Mortgagee to be paid his Principal, Interest and Costs according to his priority: that as, in this Case, the Fund was not sufficient to pay, in full, the Principal and Interest found due to the Plaintiff, the whole of the Fund ought to be transferred to him; *Belchier v. Renforth* (a): that *Kenebel v. Scrafton* (b), was incorrectly reported, as, in

(a) 1 Eden. 523; and 5 Bro. P. C. 292, Toml. Edition, where the Decree is set forth. The Reporter has been referred to the following Cases also, which support the proposition above contended for: *Davies v. Topp*, Seton on Decrees, 97; *Wride v. Clarke*, *ibid.* 105; *Geary v. Geary*, *ibid.* 173; *Wakeham v. Lome*, *ibid.* 275; *Tonkin v. Roberts*, Reg. Lib. B. 1742, fol. 628. But see *Brace v. The Duchess of Marlborough*, Mos. 50; *Pace v. Marsden*, Seton on Decrees, 274; and *Hamond v. Bradley*, *ibid.*

(b) 13 Ves. 370; Reg. Lib. A. 1806, fol. 462.

that Case, the Bill was a Creditor's Bill, and the Mortgagees were not parties to it, but appeared, by Counsel, at the Hearing for further Directions.

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UPPERTON
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Mr. Knight, Mr. James Russell and Mr. Addis appeared for the Defendants.

The Vice-Chancellor ordered the whole of the Fund to be transferred to the Plaintiff.

TAYLOR v. D'EGVILLE.

IN this Case, certain Persons who were not Parties to the Cause, had obtained permission to attend the Proceedings in the Master's Office under the Decree; and they afterwards took Exceptions to the Report in the usual manner.

1835:
30th June.

Practice.
Exception.
Report.

The Vice-Chancellor said that Persons who were not Parties to a Cause, could not except to a Report, unless they presented a Petition stating their Objections and praying for leave to except.

Sir C. Wetherell, Sir W. Horne, Mr. Treslove. Mr. Kindersley, Mr. Bridger, Mr. Wright, Mr. Bagshawe, and Mr. R. Roupell were Counsel in the Cause.

Persons not Parties to a Cause, but who have obtained Leave to attend the Proceedings in the Master's Office, if they wish to except to the Report, must present a Petition, stating their objections and praying for leave to except.

1835 :
2d & 4th July.

Will.
Construction.
Revocation.

Testator, by his Will, devised his Messuages, Tenements, &c. called *Penty Park*, to *J. L.* for Life, with Remainders to his first and other Sons, in Tail: and he devised his Messuage, Tenement and Lands known by the Name of *Coedllys*, to *J. P.* for Life, with Remainders to his first and other Sons in Tail: and, in the subsequent Parts of his Will, he mentioned the Estates as his *Penty Park* and *Coedllys* Estates. By a Codicil, after reciting that he had given the *Penty Park* Estate, to *J. L.*, he revoked the said *Penty Park* Estate, and gave it to *J. P.*; and, after further reciting that he had given the said *Coedllys* Estate, in his Will, to *J. P.*, he revoked the said Bequest, and gave the said *Coedllys* Estate to *J. L.* Held that all the Limitations in the Will, of the two Estates, were revoked, and that *J. P.* took *Penty Park* in Fee, and *J. L.*, *Coedllys* in Fee.

PHILIPPS v. ALLEN.

JAMES PHILIPPS, late of *Penty Park* in the County of *Pembroke*, Esq., by his Will dated the 11th of January 1790, devised to *John Lloyd* of *Plymouth Dock* and *George Philipps* of *Haverfordwest*, all those his Capital Messuages, Tenements and Demesne Lands, commonly called *Penty Park* and *Coedllys*, and also all other his Messuages, Tenements, Mills, Lands, Improprate and Rectorial Tithes, Chapelries, Glebe Lands, Advowsons, Rights of Presentation to Livings, and all other his Real, Freehold and Leasehold Estates situate in the several Counties of *Pembroke* and *Carmarthen* and in the County of the Borough of *Carmarthen*, To hold to them, the said *John Lloyd* and *George Philipps* and their Heirs, in Trust to and for the several Uses, and subject to the several Trusts, Terms, Powers, and Conditions, Limitations, Appointments and Agreements, and subject to the several Annuities, Debts and Legacies thereafter mentioned, expressed, limited, appointed and declared of, for and concerning the same: (that is to say), as for and concerning all his Capital Messuage, Tenement and Demesne Lands called *Penty Park*, and all other his Freehold and Leasehold Messuages, Tenements, Mills, Lands, Improprate and Rectorial Tithes, Chapelries, Glebe Lands, Advowsons, Rights of Presentation to Livings,

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situate in the County of *Pembroke* (the Rectorial and Improprate Tithes and Glebe Lands of the Parish of *Clarbeston* and the Advowson thereunto belonging, and also his Freehold Messuage, Tenement, and Lands lying in the Parishes of *Robeston Watham* and *Nurberth*, in the said County of *Pembroke*, and which he should otherwise dispose of, only saved and excepted) To the use of his Daughter, *June Philipps*, during her life, with Remainder to the Trustees and their Heirs, during her life, in Trust to support Contingent Remainders, with Remainder to the use of the first and other Sons of *Jane Philipps* successively in Tail, with Remainder to the use of her first and other Daughters successively in Tail, and, for default of such Issue, the Testator devised the said Premises (except as before excepted) to the same Trustees and their Heirs, during the life of his Daughter, *Mary*, then the Wife of Lord *Milford*, in Trust to pay and apply the Rents and Profits thereof for her separate Use, and, after the decease of Lady *Milford*, the Testator devised the same Premises (except as before excepted) to the use of Lord *Milford* for his life, with Remainder to the Trustees and their Heirs, during his life, in Trust to preserve Contingent Uses and Estates, with Remainder to the use of the first and other Sons of Lady *Milford* successively in Tail, with Remainder to the use of her first and other Daughters successively in Tail, and, for default of such Issue, the Testator devised all and singular the Premises therein and hereinbefore mentioned and described and limited (except as before excepted) to the use of his Nephew, *James Lloyd*, for his life, with Remainder to the Trustees and their Heirs during his Life, in Trust to preserve Contingent Remainders, with Remainder to the use of the Testator's Nephew *John Lloyd* of *Dale Castle* in the County of *Pembroke* Esq. (eldest Son of the said

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James Lloyd) for his life, subject to Waste, with Remainder to the Trustees and their Heirs, during the life of *John Lloyd of Dale*, in Trust to preserve Contingent Remainders, and, after the decease of *John Lloyd of Dale*, to the use of his first and other Sons successively in Tail, and, for default of such Issue, to the Testator's Nephew, *James Philipps Lloyd*, the youngest Son of *James Lloyd*, in Tail, with Remainder to the Testator's own right Heirs. And the Testator declared that *James Philipps*, and all other Persons who should come into the Possession of *Penty Park* Mansion-house and Demesne Lands, under the Limitations of his Will, should keep the said Mansion-house and all the Outhouses thereunto belonging, and also the Gardens, Orchards, Fences, Watercourses and Lands, in good Repair.

And the Testator gave, to his said Trustees, all his Plate, Pictures, Books, Household Goods and Furniture, that should be in his Mansion-house at *Penty Park* at the time of his decease, in Trust for such Person and Persons who should, by virtue of the Limitations of his Will, be entitled to the actual Possession of the Mansion-house and Demesne Lands of *Penty Park*; it being his Will that the said Plate, Pictures, Household Goods and Furniture should go with the said Estates, according to the Limitations aforesaid, and be left at such Mansion-house as Heir-Looms.

The Will then proceeded in the following words: "And as for and concerning all my Capital Messuages, Tenement and Demesne Lands known by the name of *Coodllys*, and all other my Messuages, Tenements, Mills, Lands and Premises, and all my Real, Freehold and Leasehold Estate lying and being in the County of *Carmarthen*, and also in the County of the Borough of

Carmarthen, and all the Improprate and Rectorial Tithes of the Parish of *Clarbeston* in the County of *Pembroke*, and the Glebe Lands and Advowsons thereunto belonging and not hereinbefore by me devised, and also my Messuages, Tenements and Lands lying and being in the Parish of *Robeston Watham*, in the County of *Pembroke*, known by the Name of *Middle Hook*, and also all that Piece or Parcel of Land lying on *Narberth Mountain*, in the County of *Pembroke*, I give and devise the same and every Part and Parcel thereof, subject as before mentioned, to the said *John Lloyd* of *Plymouth* and *George Philipps*, To hold to them the said *John Lloyd* and *George Philipps* and their Heirs, (subject as aforesaid, and also subject to the Estates for Lives hereinafter by me given of the several Tenements of *Rhose* and *Pantabarramenin* in the Parish of *Killnacullipyd* in the County of *Carmarthen*), during the natural life of my Daughter, *Mary* the Wife of Lord *Milford*, in Trust nevertheless that they the said *John Lloyd* and *George Philipps* and the Survivor of them and the Heirs of such Survivor, receive, pay and apply all the Rents, Issues and Profits of all and singular the Premises hereinbefore last mentioned and described (and not hereinbefore by me specifically given and limited to my Daughter *Jane* as aforesaid) to the said *Mary Lady Milford*, for her sole and separate Use:" and, after her decease, the Testator devised the last mentioned Premises to Lord *Milford* for life, with Remainder to the Trustees, during his life, to preserve Contingent Remainders, with Remainder to the First and other Sons of *Lady Milford* successively in Tail, with Remainder to her First and other Daughters successively in Tail, with remainder to the Testator's Daughter *Jane Philipps*, for her life, with Remainder to the Trustees and their Heirs, during her life to preserve Contingent Remainders, with Remainder

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to her First and other Sons successively in Tail, with Remainder to her First and other Daughters successively in Tail, and, for default of such Issue, then as to all the Testator's Messuages, Tenements, Mills, Lands and other Real Estate in the County of *Carmarthen*, he devised the same to the Trustees and their Heirs, to the use of his Nephew *James Philipps Lloyd*, for life, with Remainder to the Trustees and their Heirs, during the life of *James Philipps Lloyd*, in Trust to preserve Contingent Remainders, with Remainder to the First and other Sons of *J. P. Lloyd* successively in Tail, with Remainder to all his Daughters in Tail, and, for default of such Issue, then as for and concerning all and singular the last mentioned Premises, he gave and devised the same for want of such Issue, and also for and concerning all the said Testator's several other Messuages, Hereditaments and Premises in the Counties of *Pembroke* and *Carmarthen*, and in the County of the Borough of *Carmarthen* thereinbefore lastly limited to his Daughter Lady *Milford* according to the Limitations of his said Will, he gave and devised the same to the Trustees and their Heirs, to the use of *John Lloyd of Dale*, for life, with Remainder to the Trustees and their Heirs, during his life, in Trust to preserve Contingent Remainders, with Remainder to the first and other Sons of *John Lloyd of Dale* successively in Tail, with Remainder to *James Philipps Lloyd*, in Tail, with Remainder to the Testator's own right Heirs. And the Testator empowered his Daughter, *Jane Philipps*, and Lord and Lady *Milford*, and all other Persons who should, by virtue of the Limitations of his Will, be in the possession or in the receipt of the Rents and Profits of the same Hereditaments and Premises thereby devised according to the Limitations of his Will, to lease, in Possession but not in Reversion, for any Term of Years

not exceeding 21 Years, or for any One, Two or Three Life or Lives, all or any of the Premises before by him given and devised, except the Capital Messuage and Demesne Lands of *Penty Park*. And the Testator gave all his Messuages, Burgages, Dwelling-houses, Gardens and Appurtenances whatsoever in the Town of *Tenby* in the County of *Pembroke*, to his Servant *Mary Thomas*, her Heirs and Assigns for ever. And he also gave to her all that Messuage, Tenement and Lands with the Appurtenances, called *Llysdrindion* or the *Rhose*, then in the Testator's possession, and in the Will described as being part of *Coedllys* Estate, To hold to her and her Assigns for her life, and, after her decease, then the Testator gave the said Messuage, Tenement, Lands and Premises to the Trustees and their Heirs, in Trust for such Uses and under such Limitations as he had thereby given and devised his *Coedllys* Estate.

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And he devised all that his Messuage, Tenement and Lands with the Appurtenances, called *Pantabarramenin*, therein described as being part of *Coedllys* Estate, to the Trustees and their Heirs, in Trust, during the lives of his Servant *Elizabeth Philipps* and *Ann* the Wife of *John Childs* and the Life of the Survivor of them, to pay the Rents and Profits thereof equally between them, and the whole to the Survivor, and, after the decease of the Survivor, in Trust for the several Uses and under the same Limitations as he had thereby devised his *Coedllys* Estate: and he gave an Annuity of 20*l.*, to be issuing out of his *Coedllys* Estate, to *James Philipps Lloyd*, for his life; and an Annuity of 10*l.* to his Niece *Briana Lloyd*, for her life, to be issuing out of his *Penty Park* Estate, and to be paid by the Person who should be in possession and receipt of the Rents of

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his *Penty Park* Estate under the Limitations of his Will.

The Testator then gave an Annuity of 10*l.* to his Niece, *Louisa Lloyd*, during her life, to be issuing out of his *Penty Park* Estate. And he gave a Leasehold Estate in the Parish of *Wiston* in the County of *Pembroke*, to his Trustees upon the like Trust to be enjoyed with his Demesne of *Penty Park*. And he bequeathed to his Trustees, his Personal Estate not specifically bequeathed, in Trust to convert it into Money and pay his Debts, Funeral Expenses and Legacies: but, in case his Personal Estate should not be adequate to the payment of the same, then he charged the deficiency on his Freehold and Real Estates in the Counties of *Pembroke* and *Carmarthen* and County of the Borough of *Carmarthen* (*Penty Park* and *Coedllys* Demesne and the several Tenements adjoining to them saved and excepted) without prejudice to the several Annuities or the Estates for the lives of *Mary Thomas*, *Elisabel Philipps* and *Ann Childs*; and, in that case, he authorized his Trustees, by Sale or Mortgage of such part of his Estates in the Counties of *Pembroke* and *Carmarthen* and County of the Borough of *Carmarthen*, as his Daughter, *Jane Philipps* and Lord and Lady *Milford* or the Survivor of them should approve of (save and except as aforesaid) to raise as much Money as his Personal Estate should be deficient to pay his Debts, Funeral Expenses and Legacies.

The Testator made a Codicil dated the 23d of April 1792, and reciting that he had, by his Will devised his Real Estate called his *Coedllys* Estate lying in the County of *Carmarthen*, immediately after the decease

of his two Daughters *Jane Philipps* and Lady *Milford* and his Son-in-Law Lord *Milford* and the Survivor of them, in case his two Daughters should die without Issue, unto his Nephew *James Philipps Lloyd* second Son of his Nephew *James Lloyd* for his life, and to his Issue in such manner as therein directed; but that, in case *James Philipps Lloyd* should die without Issue, then the said Estate was limited to his Nephew *John Lloyd of Dale*. The Testator then expressed himself as follows: "Now my Will and meaning is, and I do hereby give, devise and bequeath my said Real Estate called *Coedllys Estate*, after the decease of my said Nephew, *James Philipps Lloyd* without Issue, to *James David Lloyd*, second Son of my Nephew *John Lloyd*, and his Heirs, under the same conditions and Limitations as I have, in and by my last Will and Testament, given and devised the said Real Estate to the said *John Lloyd*."

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The Testator made a second Codicil attested by Two Witnesses only, and dated the 5th of December 1793, and thereby gave a pecuniary and specific Legacy.

The Testator made a third Codicil dated the 20th of June 1793, and duly executed and attested, and which was in the following words: "I, *James Philipps* of *Penty Park* in the County of *Pembroke*, having added two Codicils, the first bearing date the 2d * day of April in the year of our Lord 1792, the second bearing date the 5th day of December 1792 *, to my last Will and Testament bearing date the 11th day of January 1790, and being desirous to make some Additions and Alterations to the said my last Will and Codicils, being now of sound mind and understanding, do make this my instrument in writing, which my intent and meaning is

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should be considered as a third Codicil to my said Will, and operate in the same way, and have the same effect as my said last Will and Testament. Whereas I have, in my aforesaid Will, bequeathed The *Coedllys* Estate to my Daughter *Mary Lady Milford*, the Wife of Lord *Milford*, immediately after my decease, I do hereby revoke the Farm of *Kilnarven* belonging to the said Estate, and bequeath the said Farm of *Kilnarven* to my Nephew *James Lloyd* of *Mabus* Esq., during his natural life, and afterwards to revert to whoever shall be in Possession of the *Coedllys* Estate at the time of the decease of the said *James Lloyd*. I likewise give to *Briana Lloyd*, Sister of the aforesaid *James Lloyd* Esq., the Sum of 10*l. per Annum*, during her natural life: I likewise give to *Lawford Cole* the Sum of 10*l. per Annum* during his natural life." The Codicil also gave Annuities to several other Persons for *their lives*, and Sums in gross to other Legatees, and then continued as follows: "Whereas, in my last Will aforesaid, I have given and bequeathed the said *Penty Park* Estate, to *John Lloyd* of *Dale Castle*, after the decease of my Daughter *Jane Philipps*, and my Daughter Lady *Milford*, and my Son-in-Law Lord *Milford*, and I have likewise given the *Coedllys* Estate to *James Philipps Lloyd* after the decease of my Daughter *Jane Philipps* and my Daughter Lady *Milford* and my Son-in-Law Lord *Milford*: I do hereby revoke the said *Penty Park* Estate, and give and bequeath the said *Penty Park* Estate to *James Philipps Lloyd*, second Son of *James Lloyd* of *Mabus*, after the decease of my Daughter *Jane Philipps* and my Daughter Lady *Milford* and Son-in-Law Lord *Milford*, on condition that he take and use the Surname of *Philipps* only, and that the Coat of Arms belonging to the *Philipps's*, be taken out of the Herald's Office in *London*. And whereas I have given the *Coedllys* Estate

my last Will aforesaid, to *James Philipps Lloyd* aforesaid after the decease of my Daughter *Jane Philipps* and my Daughter Lady *Milford* and my Son-in-Law Lord *Milford*, I hereby revoke the said Bequest, and give the said *Coedllys* Estate, after the decease of my daughter *Jane Philipps* aforesaid and Lady *Milford* and Lord *Milford* aforesaid, to *John Lloyd of Dale Castle* Esq., eldest Son of *James Lloyd of Mabus* Esq., on condition that the said *John Lloyd* take and use the name of *Philipps* only."

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The Testator died in October 1794, leaving all the devisees named in his Will him surviving.

The eldest Son of *John Lloyd of Dale Castle* was named *John Allen Lloyd*. He died in the lifetime of his Father, leaving the Defendant *John Philipps Allen Lloyd*, who was born in the Testator's lifetime and afterwards took the Name of *Philipps*, his eldest Son. After the Testator's death, *James Philipps Lloyd*, the Plaintiff in the Cause, took the Name and Arms of *Philipps*. He had not any Son born in the Testator's lifetime, but, after the Testator's death, he had a Son born, namely, the Defendant *Frederick Lewis Lloyd Philipps*.

Jane Philipps and Lady *Milford* died without having had any issue. Lord *Milford* survived them, and died November 1823, and all the other Devisees for life named in the Will were also dead.

John Lloyd of Dale Castle died in the lifetime of Lord *Milford*, leaving his Grandson, the Defendant *John Philipps Allen Lloyd Philipps* his Heir at Law, and Heir of the Testator.

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The Bill was filed for the purpose of having the Rights and Interests of the Plaintiff and of the Defendants *John Philipps Allen Lloyd Philipps* and *Frederick Lewis Lloyd Philipps*, in the Testator's Estates, ascertained and declared; and, after alleging that all the *Pembrokeshire* Estates were usually distinguished and described, by the Testator, in Rentals, Accounts and other written Documents, and also verbally, by the name of *The Penty Park Estate*, the Bill insisted that the Plaintiff was entitled in Fee Simple, or, if not, for his life, to all the last-mentioned Estates not specifically excepted, or devised to any other person by the Will and Codicils.

The Defendant *John Philipps Allen Lloyd Philipps*, by his Answer, insisted that if, by the effect of the third Codicil, the Plaintiff and *John Lloyd of Dale Castle*, took Estates for life only, the Defendant *John Philipps Allen Lloyd Philipps* was entitled to the Reversion in Fee, after the Plaintiff's death, in the Premises devised to the Plaintiff, and that he, *John Philipps Allen Lloyd Philipps*, was absolutely entitled to the Premises devised to *John Lloyd of Dale Castle*.

The Defendant, *Frederick Lewis Lloyd Philipps*, by his Answer insisted that, by the third Codicil, *John Lloyd of Dale Castle*, became entitled, for his life only, to the Estates in the County of *Carmarthen*; and that by reason of his death, he, the Defendant, *Frederick Lewis Lloyd Philipps*, was entitled to the whole of the last-mentioned Estates as Tenant in Tail in Possession.

In pursuance of the Decree on the hearing of the Cause, a Case was made for the Opinion of the Judges of the Court of King's Bench, on the following Questions:

1. To what Estate is the Plaintiff entitled, under the Will and Codicils or any of them, in such of the Testator's Hereditaments as passed to him under such Will and Codicils or any of them?

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2. To what Estate is the Defendant, *John Philipps Lloyd Philipps*, entitled, under the said Will and Codicils or any of them, in such of the Testator's Hereditaments as passed to him by the Will and Codicils or any of them?

3. Does the Defendant, *Frederick Lewis Lloyd Philipps*, take any and what Estate, under the Will and Codicils, in any and what part of the Testator's Hereditaments?

4. Is the Defendant, *John Philipps Allen Lloyd Philipps*, as Heir at Law of the Testator or of *John Lloyd of Dale Castle*, entitled to any and what Estate and what part of the Testator's Hereditaments?

5. Case having been argued, Mr. Justice *James* delivered the opinion, who differed in opinion from the other learned Judges, returned the following Certificate dated the 4th of November 1833:

1. I am of Opinion that the Plaintiff is entitled, under the Third Codicil, to an Estate in Fee Simple in such of the Testator's Hereditaments as passed to him under that Codicil: because the word *Estate* in a Devise, when coupled with a Local Description, as here in the said, "*Penty Park Estate*," by the current of Authority means the whole of the Testator's Interest, as well as the *corpus* of the Land, unless the Context demonstrates that the Testator used it in the latter sense only, or in-

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tended to pass less than his whole Interest ; and, looking at the extreme confusion that would be introduced by confining the word, in this Case, to one of its significations or construing it to give an Estate for Life, I think the Testator cannot have intended to use the word in a restricted sense. The Plaintiff is also entitled to an Estate Tail, in remainder expectant on the determination of the several Estates Tail limited, by the Will, to the Sons of *John Lloyd of Dale*, in the Hereditaments in the County of the Borough of *Carmarthen*, and also in those in *Pembrokeshire* excepted, by the Will, out of the *Penty Park* Estate.

Second : I am of Opinion that *John Philipps Allen Lloyd Philipps*, the Defendant, is not entitled, under the said Will and Codicils, to any Estate in any of the Testator's Hereditaments, in his own Right, but only as Heir at Law of *John Lloyd of Dale*, as hereinafter mentioned, and as Heir of the Body of his eldest Son.

Third : I am of Opinion that the Defendant *Fredrick Lewis Lloyd Philipps* takes no Estate, under the said Will and Codicils, in any part of the said Testator's Hereditaments.

Fourth : I am of Opinion that the Defendant *John Philipps Allen Lloyd Philipps* is not entitled to an Estate in Possession in any part of the Testator's Hereditaments, as Heir at Law of the Testator ; but that he is entitled, as such Heir at Law, to the Reversion of the Hereditaments in the Borough of *Carmarthen* and the said excepted Hereditaments in *Pembrokeshire*, expectant on the Determination of the Estates Tail therein : and that he is entitled, as Heir at Law of *John Lloyd of Dale*, who, I presume survived the Testator, to an Estate

in Fee Simple in the *Coedllys* Estate, and to an Estate in Fee Tail as Heir of the Body of *John Allen Lloyd*, (who, I also presume, survived the Testator,) eldest Son of *John Lloyd of Dale*, in the Lands in the Borough of *Carmarthen* and the said excepted Hereditaments."

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The following Certificate, dated the 7th of December 1833, was returned by Lord Chief Justice *Denman*, Mr. Justice *Littledale* and Mr. Justice *Patteson*.

"We are of opinion, first: That the Plaintiff is entitled, under the Will and Codicils of the Testator, to an Estate for Life only in such of the Testator's Hereditaments as are situate in the County of *Pembroke*, excepting the Advowson, Tithes and Glebe Lands of *Clarbeston* and the Lands in the Parish of *Robeston Watham* and *Narberth*, as to which and also as to the Testator's Hereditaments situate in the County of the Borough of *Carmarthen*, the Plaintiff is entitled to an Estate Tail expectant on the determination of the Estate Tail of the Defendant *John Philipps Allen Lloyd Philipps*.

Secondly: That the Defendant *John Philipps Allen Lloyd Philipps* is entitled, under the Will and Codicils, to an Estate in Fee Tail in such of the Testator's Hereditaments as are situate in the County of *Pembroke* and in the County of the Borough of *Carmarthen*, but, as to so much of the Hereditaments as passed to the Plaintiff for life as above mentioned, not to take effect in Possession until the death of the Plaintiff.

Thirdly: That the Defendant *Frederick Lewis Lloyd Philipps*, under the Will and Codicils, takes an Estate in Fee Tail in such of the Testator's Hereditaments as

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are situate in the County of *Carmarthen*, but not to take effect, in Possession, until the death of the Plaintiff.

Fourthly: That the Defendant *John Philipps Allen Lloyd Philipps*, as Heir at Law of the Testator, is entitled to such of the Testator's Hereditaments as are situate in the County of *Carmarthen*, during the life of the Plaintiff, such Interest, under the events that have happened, not being disposed of by the Will and Codicils."

According to the above Certificates, Mr. Justice *James Parke* was of opinion that, by the Third Codicil, all the Limitations, in the Will, as to the *Penty Park* and *Coedllys* Estates, subsequent to the Limitations to *Jane Philipps* and Lord and Lady *Milford*, were revoked, and that *Penty Park* was devised to the Plaintiff in Fee, and *Coedllys*, to *John Lloyd of Dale Castle* in Fee: but the other learned Judges were of opinion that the Third Codicil had no other operation, as far as the Parties to the Suit were concerned, than to revoke the Life Estate in *Penty Park*, given, by the Will, to *John Lloyd*, and the Life Estate in *Coedllys* given to the Plaintiff, and to give a Life Estate in *Coedllys* to *John Lloyd*, and a Life Estate in *Penty Park*, to the Plaintiff.

The Cause now came on for further Directions.

Mr. *Jacob*, Mr. *Wilson* and Mr. *G. Richards* appeared for the Plaintiff, who was interested in supporting the Certificate of Mr. Justice *James Parke*, the *Penty Park* Estate being more valuable than the *Coedllys* Estate.

The Testator, in his Third Codicil, recites that he had, in his Will, bequeathed his *Coedllys* Estate to Lady *Milford*; and he then says that he revokes *the farm of Kilnarven* belonging to that Estate, and bequeaths the said Farm to his Nephew, *James Lloyd*, *during his natural life*. But he does not suppose that he has disposed of all the Interest on that Farm; for he says that it shall afterwards revert to whoever shall be in possession of the *Coedllys* Estate at the time of *James Lloyd's* decease; and, therefore, when he uses the words: "I revoke the Farm of *Kilnarven*," he must have meant to use them in the sense of revoking all the Limitations in his Will respecting that Farm. His purpose would not have been effected by revoking only the Limitation to Lady *Milford* for her life; for *James Lloyd* might happen to die in Lady *Milford's* lifetime, and then the Farm would remain undisposed of until her death. Consequently the Testator must have intended to revoke all the Limitations of the Farm.

Then follow the material Clauses relating to the *Penty Park* and *Coedllys* Estates, upon which the question arises whether the Testator intended to revoke all the Limitations in his Will as to those Estates, and to dispose of the whole Interest in them, or whether he meant to revoke only the Limitations for the lives of his Nephews and to substitute other Limitations for Life in their place, leaving all the subsequent Limitations subsisting. It has been decided, in a great variety of Cases, that the word "Estate," although accompanied by words of local description, will pass a Fee (a). The Case of *Pettiward v. Prescott* (b) went the farthest of all the Cases in which

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(a) See Jarman's Edit. of Powell on Devises, 2d vol. p. 411, *et seq.*

(b) 7 Ves. 541.

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that word was held not to pass a Fee. But that Case was, in effect, overruled by *Harding v. Gardner* (c). In *Wilkinson v. Chapman* (d), (which was a Suit for specific Performance) the Testator gave, to his Wife, a yearly Rentcharge of 12*l.* to be issuing out of all his Real Estate, Lands, Tenements and Hereditaments in *Pinchbeck*; and then he gave, to his Daughter, all his said Estate, Lands, Tenements and Hereditaments, to hold the same to his said Daughter, her Heirs and Assigns for ever, subject to the Annuity for the life of his Wife; but, in case his Daughter should happen to die under the age of 21 years and without lawful Issue, then he gave, all his said Estate, Lands, Tenements and Hereditaments, unto his Wife, for and during the term of her natural Life, and, after her decease, he gave, all his said Estate, Lands, Tenements and Hereditaments, unto all the Children of *John Hipworth*, to be equally divided amongst them, Share and Share alike, as Tenants in Common. Lord *Gifford* M. R. was of opinion that the words were sufficient to carry a Fee to the Children of *John Hipworth*: and the Judges of the Court of King's Bench having certified to the same effect, The *Master of the Rolls* decreed a Specific Performance, which he would not have done if he had entertained any doubt upon the point. In *Gall v. Esdaile* (e), the Testator devised as follows: "As to the rest of my Estate, the two Houses, one in *St. Jones's-lane*, and the other in *Togwell-court Chateaus-lane*, I give to my loving Wife, *Mary Mayor*, for her Life; and, after her decease, that in *St. Jones's-lane*, to my Daughter, *Mary Mayor*; the other between my two Sons, *John* and *Joseph Mayor*, to be equally di-

(c) 1 Brod. & Bing 72.

(e) 8 Bing. 323.

(d) 3 Russ. 145.

vided." The Court of Common Pleas decided that the Daughter took a Fee in the House devised to her. The *onus* of showing that the word "Estate" was not intended to pass the Fee, lies on those who attempt to restrict its meaning. The Testator, when he intended to give a Life Estate only, knew how to express his meaning: for, when he devises the Farm of *Kilnarven* to *James Lloyd*, and in several other instances, he uses the words, "during his natural Life;" and he knew that something still remained to be done; for he says that, afterwards, that Farm shall revert to whoever shall be in possession of the *Coedllys* Estate: but he uses no such expression in the subsequent part of his Codicil. Moreover the Testator directs that his Nephew shall take his Name and Arms: that direction was relied on, in *Robinson v. Robinson* (f) as showing an Intention to pass an Estate of Inheritance. Not only is there nothing in the Codicil which shows that the Testator used the word "Estate" in a restricted sense, but everything that is to be collected from it, proves that he meant to use that word in the sense in which the Law usually considers it.

Where a Testator, in the same sentence, revokes a prior devise and makes a new Disposition of the Property, and uses the same words in both instances, the same construction must be put on the words of disposition, as on the words of revocation. Now it is not possible to say that the Testator has revoked the Life Estate of *John Lloyd*, but has not affected the Limitations to his Issue: for by giving, to the Plaintiff, an Estate for his own Life, he has created a greater Estate than that which he had previously given; and, consequently, he has, in effect, revoked the subsequent Limitations for so long as the Plaintiff may live after *John Lloyd*.

(f) 1 Burr. 38. S. C. 2 Vez. 225.

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Great inconvenience would be occasioned by adopting the Certificate of the Three Judges. For, first, the Sons of the Plaintiff and *John Lloyd*, would not take the same Estates as their Fathers held for their lives; and the Sons would not take their Estates on the deaths of their respective Fathers. Secondly: there would be a Partial Intestacy. And, thirdly: if the Life-estates are revoked, the Limitations to the Trustees to preserve Contingent Remainders would be revoked also, and the Contingent Remainders would be destroyed. We contend therefore, that the Court ought to give effect to the Certificate of Mr. Justice *James Parke*.

Mr. *Barber* and Mr. *R. Atkinson* for the Defendant,
Frederick Lewis Lloyd Philipps, the Plaintiff's
Eldest Son:

It is the interest of our Client to contend that the Certificate of the Three Judges is right. In the argument for the Plaintiff, the third Codicil has been treated as a Will and not a Codicil. It is a settled Rule of Law, that a Codicil revokes only so much of the Will as it does expressly revoke. In *Willet v. Sandford* (g) Lord *Hardwicke*, C. says: "A Codicil made after a Will and directed to be annexed thereto, is considered, both in our Law and in the Civil Law (from which we borrow ours with regard to Wills) as part of the Will; although, in notion of Law, there may be other Codicils not part of the Will: as, in the Civil Law, a Testamentary Schedule, though no Will at all: but this is part thereof, and, therefore, in its own nature, is not intended to be a revocation of the Instrument of the Will; for there may be a revocation of the particular dispositions, and yet not of the Instrument, but to be added and made part thereof." There is another Case, *Beable v. Dodd* (h) which shows that a Codicil is to be construed as if made

(g) 1 Ves. 186. See 187.

(h) 1 T. R. 193.

the same time and incorporated with the Will. In Case, if the Will and Codicil are looked at together, there can be no doubt that the Certificate of the Three Judges is right.

The word 'Estate' in a Will, may or may not pass a

It will not pass a Fee, if it can be collected, from the Will, that the Testator did not intend that it should have that effect. In every case in which that word, accompanied by words of description, has been held to pass a Fee, the expression has been, "all my Estate;" there have been introductory words showing that the Testator intended to dispose of all his property. It appears, by the Evidence in the Cause, that the *Pentty* and *Coedllys* Estates, were always known by those names; and those Names are used in the Will, although drawn by a professional Person. The Third Codicil was not drawn by a professional Person.

A revocation cannot have a more extensive operation as to one Estate, than it has as to the other. When the Testator speaks of the Estate, he does not say: "I hereby revoke the said *Coedllys* Estate," but: "I do hereby revoke the said Bequest;" by which he clearly means to revoke only the Life-interest given to the Testator in that Estate: and, therefore, when he revokes the *Pentty Park* Estate, he cannot intend to do more than to revoke the Life-interest in that Estate given to his son *John Lloyd*.

Mr. *Preston* and Mr. *Wilbraham*, for the Defendant
John Philipps Allen Lloyd Philipps, the Grandson of *John Lloyd*:

The Courts never hold a Codicil to be a revocation of a Will, further than the Testator has expressed an intention to revoke it. In this Case the Testator, in the Third Codicil, recites that he had, by his Will,

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given the *Penty Park* Estate to *John Lloyd*, after the decease of his Daughters, *Jane Philipps* and *Lady Milford*, and his Son-in-Law *Lord Milford*, and that he had given the *Coedllys* Estate to the Plaintiff, after the decease of the same Persons; and he says: "I do hereby revoke the said *Penty Park* Estate," that is, the *Penty Park* Estate which he had, by his Will, given to *John Lloyd* for life. It is manifest that the Testator, when he made the Third Codicil, had the Limitations of his Will in his contemplation, and that he did not intend to alter those Limitations, but only to substitute the *Penty Park* Estate for the *Coedllys* Estate, and *vice versa*. *Holder v. Howell* (i), *Seale v. Barter* (k), *Trafford v. Trafford* (l).

Next, as to the effect of the word 'Estate.' The Testator commences his Will by giving: "All those his Capital Messuages, Tenements and Demesne Lands commonly called *Penty Park* and *Coedllys*:" is there any doubt that the words, '*Penty Park* and *Coedllys*,' as here used, are descriptive of the Property merely, and have no reference to the quantity of Interest. In all the subsequent Gifts, we find the same words occurring as descriptive of the subject-matter of disposition, and not of the quantity of Interest: and it must be presumed that the Testator used those words, in his Codicils, in the same sense as he had used them in his Will. The Will and the Codicil must be construed together. In his Will he calls the Estates his *Penty Park* and *Coedllys*' Estates, and yet he subjects them to Limitations. The word 'Estate' can never be held to pass a Fee, where the effect would be to defeat Limitations to which the Estate is subjected. *Doe v. Harvey* (m).

(i) 8 Ves. 97.

(k) 2 Bos. & Pull. 485.

(l) 3 Atk. 347.

(m) 4 Barn. & Cress. 610.

See Judgment of *Halroyd, J.*
p. 623.

If the Plaintiff had died in the Testator's lifetime, and *John Allen Lloyd Philipps* had claimed one of the Estates by Gift, and the other by Act of Law, the Court would have struggled against giving effect to that claim.

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Mr. *Pole* appeared for the other Defendants.

The VICE-CHANCELLOR :

I cannot but think that Mr. Justice *Parke* has arrived at the right conclusion.

The Testator, in his Will, uses the expressions : " My *Penty Park Estate*," and " my *Coedllys Estate*." In the First Codicil, which, as well as the Will, must be taken in connexion with the Third Codicil, he says : " I do hereby give, devise and bequeath *my said Real Estate called Coedllys Estate*, after the decease of my said Nephew *James Lloyd Philipps* without Issue, to *James David Lloyd*, second Son of my Nephew *John Lloyd*, and his Heirs, under the same Conditions and Limitations as I have, in and by my last Will and Testament, given and devised *the said Real Estate* to the said *John Lloyd*." There the Testator uses the expression, " the said Real Estate," as descriptive of what he had before called, " his said Real Estate called *Coedllys Estate*." I make that observation, because, in the Third Codicil, the Testator has used the words, " The *Coedllys Estate*," but, having regard to the Will and to the First Codicil, those words must be taken to be synonymous with, " my said Real Estate called *Coedllys Estate*."

There is great weight in the observation made by Mr. *Jacob*, that the Testator, after revoking the Farm of

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Kilnarven, which was a portion of the *Coedllys* Estate, and meaning to give a Life Estate in it to his Nephew *James Lloyd*, uses the words, "during his natural life, and, afterwards, to revert to whoever shall be in possession of The *Coedllys* Estate, at the time of the decease of the said *James Lloyd*." So that he has given an Estate for Life, in that Farm, to *James Lloyd*, and let all the other Dispositions in his Will unaffected. Then the Testator says: "Whereas, in my last Will aforesaid, I have given and bequeathed The said *Penty Per* Estate, to *John Lloyd* of *Dale Castle* after the decease of my Daughter *Jane Philipps* and my Daughter Lady *Milford* and my Son-in-Law Lord *Milford*, and I have, likewise, given The *Coedllys* Estate to *James Philipps Lloyd*, after the decease of my Daughter, *Jane Philipps*, and my Daughter Lady *Milford*, and my Son-in-Law, Lord *Milford*, I do hereby revoke the said *Penty Per* Estate, and I give and bequeath the said *Penty Per* Estate, to *James Philipps Lloyd*, second Son of *James Lloyd* of *Mabus*, after the decease of my Daughter *Jane Philipps* and my Daughter Lady *Milford* and my Son-in-Law, Lord *Milford*." Now I cannot but think that this is either a complete revocation of all the Limitations in Remainder of the two Estates, or, if it is an imperfect revocation, that the devise is so perfect that it supplies any imperfection in the clause of Revocation.

Then the Testator says: "And whereas I have given The *Coedllys* Estate, in my last Will aforesaid, to *James Philipps Lloyd* aforesaid, after the decease of my Daughter *Jane Philipps*, and my Daughter Lady *Milford* and my Son-in-Law, Lord *Milford*, I hereby revoke the said Bequest, and give the said *Coedllys* Estate, after the decease of my Daughter *Jane Philipps* aforesaid and Lady *Milford* and Lord *Milford* aforesaid.

said, to *John Lloyd of Dale Castle Esq.*, eldest Son of *James Lloyd of Mabus Esq.*, on condition that the said *John Lloyd* take and use the Surname of *Philipps* only." It appears to me that, when the Testator uses the words: "I hereby revoke the said Bequest and give the said *Coodlys Estate*," he means to revoke all the Gifts over of that Estate, and to give the whole Interest in it, after the deaths of his Daughters, *Jane Philipps* and Lady *Milford*, and of Lord *Milford*, to *John Lloyd*.

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My Opinion therefore is that, in each Case, the words are sufficient to pass an Estate in Fee Simple.

If the construction which the Defendant's Counsel contend for, were to prevail, then, the Children would live in one House, during the life of their Father, and, at his death, that House would go over to another Party.

Before, however, I give my final Decision I will read over the Will and Codicils with more attention.

The VICE-CHANCELLOR:

4th July.

In this Case I have looked at the Judges' Certificates, and at the Will and Codicils again; but I cannot alter the impression I received on the Argument. In my Opinion less violence, upon the whole, will be done to that which was the manifest Intention of the Testator, by holding that the two Parties who are substituted for each other in the Third Codicil, do take Estates in Fee, than by giving that construction which the Three Judges of the Court of King's Bench have given; because it seems perfectly obvious that what the Testator meant,

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was to substitute *James Philipps Lloyd Philipps* and the persons who were to take in Remainder after him, as to one Estate, for *John Lloyd* and the persons who were to take in Succession after him, as to the other Estate. The Testator has however imperfectly carried that intention into effect: for he has not fully developed all that he meant to do: and the only question is, (as it is evident that some substitution was intended), whether the words he has used, ought to be taken to give an Estate in Fee, or an Estate for Life.

I was very much struck with the observation, made by Mr. *Atkinson*, as to the effect of the word 'Estate' as coupled with the word 'my.' But, having regard to the way in which the Third Codicil takes notice of the Will, I think the same construction must be put on that Codicil as if it had been embodied in the Will; and then there seems to me to be quite sufficient to justify the construction that Mr. Justice *Parke* has put upon it, and, therefore, I think that his construction ought to be adopted.

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In the 1796 *Thomas John Parker*, being seised in Fee in certain Plantations and Estates in *Jamaica* called *le, Brazaletto* and *Chesterfield*, demised those Estates to Trustees for 500 years, in Trust to raise, after his decease, 40,000*l.* for his eldest Son *Henry Parker* and Three other Sons by his first Marriage.

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Thomas John Parker, at different times afterwards, charged his Estates with Annuities and Sums of Money for the benefit of his second Wife and his Children, and created several Mortgages and further charged on his Estates for securing Monies lent to him, from time to time, by the Defendant *Timperon*, and applied the Firm of *Timperon & Dobinson*, in which the Defendant *Timperon* was a Partner, the Consignees of the produce of his Estates.

Devises and Legatees filed a Bill against the Trustees and Executors of the Will and a Mortgagee in possession of Part of the Estates, alleging that the Trustees and Executors colluding with the Mortgagee, refused to make him account for the Rents which he had received or to redeem the Mortgage, and praying for an Account of the Testator's Assets, and that the Mortgage might be redeemed.

Thomas John Parker died in April 1823, having, by his Will, given his *Chesterfield* Estate, subject to a due provision of the Charges and Incumbrances thereon, to *Parker* in Fee, and his *Hillside* and *Brazaletto* Estates, subject in like manner, to Trustees in Trust, out of the Rents to pay certain Annuities, and, subject thereto, to the payment of his Funeral and Testamentary Expenses, Debts and Legacies, to *Henry Parker* in Fee: and he gave his residuary Personal Estate to *Henry Parker*, and appointed him and the Trustees the Executors of his Will.

A Demurrer, by the Mortgagee, for Multifariousness, was allowed.

A Bill by a Person beneficially interested in a Testator's Estate, against the Executors and a Debtor to the Estate, cannot be sustained, although it alleges collusion between the Co-defendants, unless it is confined to the Recovery of the Debt.

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For some years prior to the death of *Thomas John Parker*, the Trustees of the term of 500 years had been in possession of the *Chesterfield* Estate, and had remitted the Produce to Messrs. *Timperon & Dobinson*: and the Trustees under *Timperon's* Mortgage-deeds, had been in possession of the other Estates, and had remitted the Produce of those Estates also to *Timperon and Dobinson*.

Henry Parker, in addition to his own Share of the 40,000*l.*, became entitled, by bequest and purchase, to the Shares of two of his Brothers in that Sum, and also to certain Annuities, and Arrears of Annuities which, in pursuance of an Arrangement made between *Thomas John Parker* and *Timperon*, in the course of the Transactions that took place between them, *Timperon* had covenanted to pay to *Henry Parker*, by way of Provision for him whilst the Incumbrances on the Estates were subsisting. *Henry Parker* was also entitled to the Share of his Third Brother in the 40,000*l.*, but in Trust for *Thomas Parker* (who was the Son of that Brother), and subject to a Mortgage that had been made thereof to the Defendant *Bullock*: and *Henry Parker* had mortgaged, to *Timperon*, the Three Shares of the 40,000*l.* to which he was beneficially entitled.

The 40,000*l.* was the Primary Charge on the Estates.

Henry Parker, by his Will dated in August 1836, charged his Real and Personal Estate with his Funeral Expenses and Debts, and with various Legacies and Annuities, and, amongst them, with an Annuity of 150*l.* for the Widow of one of his Brothers; and he gave the Residue of his Real and Personal Estate, to four Trustees, in Trust for all the Children of his late Brothers who should be living at his decease; and he appointed the Trustees, the Executors of his Will.

The Testator, *Henry Parker*, shortly afterwards died, leaving *Thomas Parker*, his Heir, and the Heir also of *Thomas John Parker*.

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The Plaintiffs were the Widow of *Henry Parker* and her Second Husband, and the Children of *Henry Parker's* late Brothers, who were living at his decease. The Defendants were the Executors and Trustees of the Will, two of whom were also Trustees of the term of 500 years) the other Trustee of that Term, the Executors, Trustees and Annuitants under the Will of *Thomas John Parker* and his Widow and Children by her, and *Timperon, Dobinson and Bullock*.

The Bill alleged that the Plaintiffs had requested the Defendants *William Hewitt, James Brooke, Henry Bellairs* and *Sarah Mackenzie*, the Executors and Trustees of *Henry Parker's* Will, to proceed duly to administer his Assets, and, for that purpose, to do all such Acts as might be requisite for rendering all the Properties, Shares, Rights and Interests to which *Henry Parker* was entitled at his decease, available to the purposes of his Will: that those Defendants, *colluding with the other Defendants*, had refused to comply with such Request; and particularly that *Brooke* had so refused in two Letters which he wrote to the Solicitor of the Plaintiffs*: that, if *Timperon* and *Dobinson* would account for the assignments made to them, it would appear that all the Monies due to *Timperon* on his Securities, had been paid off, and that there was a Balance due from him; in which Account *Timperon* and *Dobinson*, acting in concert and collusion together, refused to render, and the Defendants *Brooke, Bellairs* and *Sarah Mackenzie*

* The Substance of these Letters is set forth in the Appendix.

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(the Trustees of the Term of 500 years) refused to enforce: that the Plaintiffs would be deprived of their Rights if they were not permitted to sue the Defendants; because *Hewitt* was resident in the *West Indies*, and *Brooke, Bellairs* and *Sarah Mackenzie*, acting in concert and collusion with *Timperon* and the other Defendants, refused to take any steps for enforcing the Claims of the Plaintiffs: that the Defendants, *Palmer* and *Holmes*, who were the Trustees and Executors of *Thomas John Parker's* Will, refused to take any steps for the purpose of having the Rights and Interests of the Persons claiming under that Will and under the Will of *Henry Parker*, ascertained and protected: that all the Defendants, either as Mortgagees, Incumbrancers, Devisees or Legatees under the Wills of *Thomas John Parker* and *Henry Parker*, or as Trustees for such Parties, claimed Interest in the Plantations and Estates; and the Plaintiffs, having an Interest in the 40,000 l., which formed the Primary Charge on those Estates, and also in the ultimate Surplus or Equity of Redemption of those Estates, were entitled to combine all the Defendants, as parties Defendants to the Bill, for the purpose of obtaining the Relief sought thereby, and that they were necessary Parties for that purpose.

The Bill prayed for an Account of all the Charges and Incumbrances on the Estates, and of the Principal and Interest due thereon, and that their priorities might be ascertained: and for an Account of the Estates liable to pay such Charges and Incumbrances, and the Rents, Profits and Produce thereof, and by whom such Rents, &c. had been received, and what was due in respect thereof, and whether any of such Charges and Incumbrances had been satisfied; and particularly that an Account might be taken of the Rents, Profits and Produce of the

Chesterfield Estate, which had been or ought to have been received by *Brooke, Bellairs* and *Sarah Mackenzie*, as the Trustees of the Term of 500 years, and of the Balance due from them in respect thereof; and that they might be directed to pay such Balance as the Court should direct: and that an Account might be taken of the Consignments, Produce and Profits of the Estates which had been or might have been received by the Defendants *Palmer, Timperon* and *Dobinson*; and that *Timperon* might set off the amount thereof against the Principal and Interest due on his Securities, and that the Amounts remaining due on the said several Charges and Incumbrances, including what was due in respect of the 40,000*l.*, might be raised and paid; and that, for that purpose, the Estates might be sold, if necessary; and that, upon the Amount due in respect of the 40,000*l.* and Interest, being raised, *Bullock* and *Timperon* might be paid thereout the Sums due on their Mortgages affecting the 40,000*l.*, and that the Rights and Interests of the Plaintiffs, in the said Estates and Premises, might be ascertained and secured; the Plaintiffs offering to redeem such of the Charges and Incumbrances on the Estates as, in the Judgment of the Court, they ought to redeem; and that such (if any) of the Defendants as, in the Judgment of the Court, ought to redeem the Plaintiffs, might redeem them or be foreclosed: and that a Receiver might be appointed of the Estates.

Timperon demurred for multifariousness.

Mr. *Knight* and Mr. *Teed*, in support of the Demurrer, said that the Plaintiffs claimed to be interested in the Real as well as in the Personal Estate of *Henry Parker*: that a Debtor to a Testator's Estate, could not be made a Party to a Suit, unless it related to the Testator's

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Personal Estate only: that a Mortgagee could not be made a Party to a Suit for the general administration of the deceased Mortgagor's Estate and for the execution of the Trusts of his Will: that the Bill in this Case, was filed, not only against the Executors and Trustees of *Henry Parker's* Will, but against the Executors and Trustees of *Thomas John Parker's* Will and the Incumbrancers on his Estates, and that it prayed for the general administration of both their Estates and an Execution of the Trusts of both their Wills: that the Plaintiffs might have filed a Bill against the Executors and the Mortgagee, charging Collusion between them, and praying for an Account of the Rents received by the Mortgagee, and that the Mortgage might be redeemed; or they might have filed a Bill against the Executors only, praying that the Executors might be directed to take proper Proceedings against the Mortgagee. *Salvidge v. Hyde (a)*, *Mole v. Smith (b)*.

Mr. *Temple* and Mr. *Girdlestone*, Jun. in support of the Bill, cited *Newland v. Champion (c)*, *Alsager v. Rowley (d)*, *Doran v. Simpson (e)*.

THE VICE-CHANCELLOR:

In this Case, the question is whether the Bill is or is not multifarious.

Mr. *Timperon* stands in the character of Mortgagee: and, although there is some difficulty in tracing his different Interests, yet he holds the character of Mortgagee; and, from having received the Produce of the Estates, he may be considered as a Mortgagee in Possession.

(a) Jac. 151.

(b) Ibid. 490.

(c) 1 Vez. 105.

(d) 6 Ves. 748.

(e) 4 Ves. 651.

The Bill is filed by Devisees and Legatees under the Will of *Henry Parker*, who derives his Title under *Thomas John Parker*, who created the Incumbrance : and the Bill, after stating the Will of *Henry Parker* and the circumstances regarding the Probate of it, alleges that the Trustees and Executors of that Will, possessed or might have possessed themselves of the Testator's Personal Estate, much more than sufficient for payment of his Funeral and Testamentary Expenses and Debts ; and although they did, for some time, make payments, yet they had not, for some time past, made any Payments on account of the Annuity of 150*L.*, by the said Will directed to be provided for the benefit of the Plaintiff *Mary Pearse*, and large Arrears now remain due in respect thereof ; and the greater part of the said Testator's Property, both Real and Personal, now remains outstanding and unrealized. And, having made this general Allegation, the Bill then proceeds to detail the Incumbrances created by *Thomas John Parker*. It then states : " That the Plaintiffs, being entitled to have the Rights and Interests of *Henry Parker*, in the Estates and Premises aforesaid, ascertained and made applicable to the Purposes of his Will, have applied to the said *William Hewitt*, *James Brooke*, *Henry Bellairs* and *Sarah Mackenzie*, as the Executors and Trustees of the said Will of the said *Henry Parker*, and requested them to proceed duly to administer the Assets of the said *Henry Parker*." It then states that they had refused to comply with such requests, and, in particular, that *James Brooke* had so refused in two Letters which he wrote to the Solicitors of the Plaintiffs ; and, in one of such Letters, after alluding to the heavy Charges on the Estates, he alleged that there were no Assets for the Payment of either Debts or Legacies, and concluded with declining all further cor-

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responsence on the subject; and, in the other of such Letters, after stating that he had no Account to render, except of the Expense of proving the Will and of some few incidental Expenses, he again concluded with requesting that the Correspondence with him might cease, and added that, if the Plaintiffs were not satisfied, they might file their Bill. The Bill then charges that *Brooke* and the other Defendants, act in collusion together, and that, although the Property of which *Henry Parker* died seised and possessed, consisted, principally, of his aforesaid Rights and Interests in the said Plantations and Estates, yet such Rights and Interests and the Monies due in respect thereof, were of large Amount and Value, and might, by proper diligence, be received and made available to a large Amount: that large Consignments of the Produce and Profits of the Plantations and Estates had been made to *Timperon* and *Dobinson*, and ought to be accounted for by them and set off against the Monies secured and due to *Timperon*, and that, if the same were so accounted for and set off, it would appear that all the Charges, Incumbrances and Monies created and made payable by and under the several Indentures under which *Timperon* claims Title, have been or ought to have been paid off and satisfied by and out of the net Produce of the said Plantations and Estates consigned to and received by the Firm of *Timperon & Dobinson*; and so it would appear if *Timperon* and *Dobinson* would set forth an Account of the Charges and Incumbrances affecting the said Plantations and Estates under the said Indentures, and of the principal Monies and Interest which have been and are due in respect thereof, and of the Consignments, Produce and Profits of the Plantations and Estates which have been possessed and received by them, and of the application thereof; but which Account,

Timperon and *Dobinson*, acting in concert and collusion together, refuse to render, and *Brooke, Bellairs* and *Sarah Mackenzie*, refuse to enforce. And the Bill prays, &c. —(His Honor here read the Prayer of the Bill).—From these Passages it appears to me that there is sufficient, on the face of the Bill, to show that it was the intention of the Plaintiffs (although the Bill has been cautiously named), not only that there should be a declaration of the Rights and Interests, of the Plaintiffs, in the Real Estates, but also an administration of the Personal Estate of *Henry Parker*: for I cannot see why such care should be taken to state the Probate, and the situation of the Assets, both Real and Personal, except to give the Plaintiffs the benefit of whatever Personal Estate there might be, in order that *Timperon* might be paid, what (if anything) might be due to him.

I think that, upon the fair construction of the whole Bill, it must be taken to be a Bill which seeks a general Administration of the Personal Estate and a Declaration of the Rights of the Parties, which would be unnecessary for the purpose for which alone a Bill can be filed against *Timperon*, namely, for the redemption of his Mortgage: and the question is whether he has not a right to object to the Bill for multifariousness.

If he is never to be freed from this Suit until the Accounts of the Personal Estate have been taken, he will not be placed in the situation in which he ought to be, because he has a right to have the Account of his Principal and Interest taken at once, and a day fixed either for Payment of it or for a Foreclosure, and not to await the result of taking the Accounts of the Personal Estate and other matters in which he is not at all interested.

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The Case of *Doran v. Simpson* (f) has been referred to as showing that a Party interested in the Personal Estate of a Testator, has a right to sue a Debtor to the Estate, where there is collusion between him and the Personal Representative. But the right to sue extends as far as is necessary to obtain Payment of the Debt, and no further.

I remember another Case which was much discussed at the time, namely, *Burroughs v. Elton* (g). In that Case a Person who was a Creditor of *J. Weston*, filed a Bill, praying for a Receiver, and that the Personal Estate might be collected and the Debts paid. And a Decree having been made, he filed a Supplemental Bill against one *Elton*, stating the appointment of a Receiver and the Decree, and certain circumstances to show that there was an Interest available to the payment of the Debts, by reason of an Agreement that had been entered into between *Weston* and *Elton*; and the Supplemental Bill sought to give effect to that Agreement, in order that the Plaintiff and the other Creditors of the Testator might have the Benefit of it: and it was very much discussed, in that Case, whether a Creditor could file such a Bill: and Lord *Eldon* said: "The point as to the Judgment Creditor, as far as respects the Real Estate, must be maintained upon this, that the Heir will not stir: and, if the Creditor cannot proceed, the Property cannot be amenable to the Debts. In that state, generally speaking, a Creditor ought to be permitted to sue." That is, he may sue to the Extent to which it is necessary that he should sue, for realizing the Debt, in order that it may be made available for

(f) 4 Ves. 651.

(g) 11 Ves. 29.

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the Payment of what is due to himself and the other Creditors of the Testator; because the hand which ought to receive the Debt will not be stretched out to receive it.

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Those Cases, however, differ from the present; for here the sole object was to recover the Debt: but this Bill not only seeks to redeem *Timperon* (to which purpose it ought to have been confined, so far as he is concerned), but relates to a variety of other matters in which he has no interest: and therefore the Cases cited have no analogy to the present.

I am of Opinion that this Bill is multifarious, because it seeks something to be done with which the Mortgagee has no concern: and it would be a grievous hardship upon him, if he were to be kept before the Court until the various objects to which this Bill relates, had been accomplished.

The Demurrer must, therefore, be allowed: but, if the Plaintiffs think that they can put the Record right and get rid of the difficulty, they may have liberty to amend on payment of all the Costs.

MARGETTS v. BARRINGER.

1835 :
8th July.

Will.
Construction.
Separate Use.

Testator gave his Residuary Estate to *Louisa M. and Ann M.*, Share and Share alike, for their own Use and Benefit, *independent of any other Person.* Held that they were entitled to their Shares for their separate Use.

JOHN EUSTACE, by his Will dated the 26th of October 1833, gave all the Rest and Residue of his Estate and Effects whatsoever and wheresoever and of what nature, kind, or quality soever, that he might be possessed of or entitled to at the time of his decease, unto the Plaintiffs, *Louisa Margetts* and *Ann Margetts*, to be equally divided between them, Share and Share alike, for their own Use and benefit, *independent of any other Person.*

Louisa Margetts was a married Woman; and *Ann Margetts* was her Infant Daughter. The question was whether they were entitled to their Shares of the Testator's Residuary Estate, for their separate Use.

The *Vice-Chancellor* said that the words: "independent of any other Person," meant: "independent of all Mankind," and, therefore, included the Husband.

Mr. *Barber* and Mr. *K. Parker* were Counsel in the Cause.

BRUERE v. WHARTON.

THIS was a Foreclosure Suit.

The time fixed by the Decree for Payment of the Principal, Interest and Costs, was the 10th of *September* 1834. It was afterwards enlarged till the 10th of *January* 1835, and again till the 10th of *July* 1835; and an Application was now made for a further Enlargement.

The question was whether Interest was to be computed on the principal Sum only, from the time fixed by the Decree, or whether it was to be computed upon the amount of Principal, Interest and Costs found due by the Report in pursuance of the Decree.

Mr. *Knight* and Mr. *Beames*, for the Mortgagee, cited *Neal v. Attorney-General (a)*, *Bickham v. Cross (b)*, and the following Note from Lord *Colchester's MSS.*:

“ In the Exchequer, Hil. Term, 1790.

“ *Robinson v. Pennynan.*

“ After the Report of Principal, Interest and Costs on Mortgage, and time enlarged, with Order to compute subsequent Interest, this subsequent Interest shall be computed on the aggregate reported Sum of Principal, Interest and Costs, and not on the Principal only: and agreed the practice in Chancery to be the same.”

The *Vice-Chancellor* said that he always understood the practice to be as stated in the above Note, and made an Order accordingly.

Sir *William Horne* and Mr. *Pole* appeared for the Mortgagor.

(a) Mos. 246.

(b) 2 Vez. 471.

1835 :
9th July.

*Mortgagor and
Mortgagee.*

Where the Time fixed, by the Decree in a Foreclosure Suit, for Payment of Principal, Interest and Costs, is enlarged, the Court will direct subsequent Interest to be computed on the aggregate Sum found due for Principal, Interest and Costs.

1837:
20th April.

Practice.
Dismissal.
New Orders.

The Defendant, before Replication, served a Notice of Motion to Dismiss. On the next day, Plaintiff replied, and the Motion was not made, and, consequently, Plaintiff did not undertake to speed. No Subpœna to rejoin was served, and the Defendant again moved to Dismiss. Held that neither the 16th nor the 17th Order applied, but that the Case was governed by the old Practice.

EARL FERRERS v. SHIRLEY.

ON the 24th of *February* 1837, and before Replication, the Defendant served a Notice of Motion to Dismiss. On the following day Replication was filed, and the Motion was not made; and, consequently, the Plaintiff did not undertake to speed. The Replication was not followed by the service of a *Subpœna* to rejoin.

On this day, Mr. *G. Richards*, for the Defendant, again moved to Dismiss, contending that the 17th Order of 1831 applied to the Case.

Mr. *Bethell*, for the Plaintiff, said that the Case did not fall within the 16th Order, as the Motion was made after Replication; neither did it fall within the 17th Order, because the Replication had been filed after service of a Notice of Motion to Dismiss and the usual Undertaking to speed had not been given.

The *Vice-Chancellor* held that neither of the Orders applied, and, therefore, that the Case must be decided according to the old Practice; and, as three clear Terms had not elapsed since the last Proceeding in the Cause, the Motion must be refused with Costs.

CUDDON v. HUBERT.

1835:
18th and 31st
July.

*Debtor and
Creditor.
Outlawry.*

Bill stated that the Defendant *F. Hubert* Widow, indebted, to the Plaintiff, in 650*l.* and up- that the Plaintiff was induced to give Credit to he well knew that she was entitled, for life, to ate, in *Suffolk*, of great Value: that, having made t Applications to her for Payment of the Debt, hout effect, the Plaintiff commenced an Action her to recover the Debt; and, in consequence not having appeared to defend the Action, she the 11th of June 1835, Outlawed or Waived in ion; and the Judgment thereon was, on the 26th same month, Docketted: that Mrs. *Hubert* had d a Deed for the purpose of conveying her In- a the Estate, to the Defendant, *George Hubert*, 1; and that a notice of the Deed had been sent, *George Hubert's* Solicitors, to certain Mortgagees of ate. The Bill then set forth the Notice, from t appeared that, by a Deed dated the 4th of May Mrs. *Hubert* assigned her interest in the Estate so two Policies of Insurance on her life, to her The Bill then stated that, at the time of the on of the Deed, Mrs. *Hubert* was residing, ill continued to reside in *France*, or in some Parts beyond Seas, for the purpose of avoiding ocess being served on her Personally, and that ft this Country in consequence of the Plain- ring threatened to Arrest her; that the Plaintiff l the Deed to be fraudulent and void as against

A Creditor, who has obtain- ed a Judgment in Outlawry against his Debtor, is not entitled to the Aid of a Court of Equity in obtaining Possession of the Debtor's Property until he has obtained a Grant of it from the Crown.

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him, in consequence of its having been made without a *bonâ fide* Consideration, and for the purpose of delaying, hindering or defrauding the Plaintiff, a Creditor of Mrs. *Hubert*. The Bill charged that no valuable Consideration was given, by the Son, for the Estate conveyed as before mentioned; that the Mother and her Son, at the time of the execution of the Deed, knew that the Plaintiff had commenced an Action of Debt against the Mother, and was taking the necessary Proceedings for Outlawing or Waiving her, that the Deed was executed, merely, for the purpose of enabling the Son to deal with the Estate of his Mother, as on her behalf and as her Agent, in consequence of her being beyond Sea, and that there was an understanding between them to that effect; that the Son had entered into an arrangement for conveying away the Manors and other Hereditaments comprised in the Deed, and that, thereby, the Plaintiff's remedy, under the Outlawry or Waiver, against the Estate and Interest in the Tenements, Hereditaments and Premises comprised in the Deed, would be greatly impeded, if not entirely frustrated; that the Deed was Fraudulent and Void as against the Plaintiff and ought to be Cancelled. The Bill prayed that the Deed might be declared to be Fraudulent and Void as against the Plaintiff, and might be delivered up to be Cancelled; and that *George Hubert* might be restrained from parting with, or in any way making use of, or availing himself of, or acting under it.

The Defendant *George Hubert* demurred for want of Equity.

Mr. *Turner*, in support of the Demurrer:

This is a Bill of the first impression. The Plaintiff,

who is a simple Contract Creditor of Mrs. *Hubert*, having obtained Judgment in Outlawry against her, seeks to restrain the other Defendant from conveying away the Estates which are vested in him under the Deed of the 4th of May. It is like a Bill *quia timet*; for it seems that the Plaintiff fears that the Defendant will convey away the Estates before he can obtain Execution. The question is, what course the Plaintiff ought to have pursued on obtaining the Judgment in Outlawry? He ought, first, to have issued a special *Capias Utlagatum*; by which the Sheriff would have been commanded to inquire, by the oaths of a Jury, what Lands and Tenements, Goods and Chattels, including Debts and *Choses in Action*, the Defendant had, on the return of this Writ, with the inquisition annexed, three Writs would be Issued: a *venditioni exponas*, to sell the Goods; a *scire facias*, to recover the Debts; and a *levari facias*, to Levy the Issues and Profits of the Freehold Lands of the Party Outlawed. The Bill, however, does not state that any of these Writs have issued. No Forfeiture takes place with respect to the Real Estate, until the Inquisition is returned; and then the Property levied by the Sheriff, vests in the Crown; *and the Plaintiff has no interest in it, until he has obtained a Grant from The Crown.* The Judgment in Outlawry does not, of itself, entitle the Plaintiff to apply for the Assistance of this Court: for, before this Court will lend its aid to enforce the Process of a Court of Law, the Plaintiff must show that he has proceeded with the Process at Law, to its utmost extent: he must place himself in a situation to show that the Court of Law cannot give him the relief that he asks. Lord *Redesdale* says: "Courts of Equity will lend their Aid to enforce the Judgments of Courts of ordinary jurisdic-

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tion; and, therefore, a Bill may be brought to obtain the Execution or the benefit of an *elegit* or a *fieri facias*, when defeated by a prior Title either Fraudulent or not extending to the whole Interest of the Debtor in the Property upon which the Judgment is proposed to be executed. In any case, to procure Relief in Equity the Creditor must show, by his Bill, that he has proceeded, at Law, to the extent necessary to give him a complete Title. Thus, in the Cases alluded to, of an *elegit* and *fieri facias*, he must show that he has sued out the Writs the Execution of which is avoided, or the Defendant may Demur." (a).

Besides, in this Case, the Bill shows that the Plaintiff may have Relief at Law. It charges that the Deed was executed merely for the purpose of enabling the Son to deal with the Estate and Interest of his Mother conveyed thereby, as on her Behalf and as her Agent, and that there is an understanding between them to that effect. According to that Statement the Son is a Trustee for his Mother; and the Plaintiff may issue Execution against the Trust Estate under the Statute of Frauds.

Mr. Wakefield and Mr. Sergeant in support of the Bill:

The Plaintiff cannot obtain a Grant from the Crown until the Inquisition is returned, and then it will be of no avail. *Britton v. Cole* (b). The Deed too, prevents the Plaintiff from obtaining the Relief which he asks, by means of the Process at Law.

We admit that the Real Estate does not vest in The Crown until the Inquisition is returned. But the Deed

(a) Treat. Plead. 3d Edit. 101.

(b) 3 Salk. 395.

in this Case comprises, not only Real Estate, but Policies of Insurance : and Personal Property becomes vested in The Crown for the use of the Plaintiff, immediately upon the Outlawry. The *Protector v. Lord Lumley* (c), The *King v. Cooke* (d). The Plaintiff is entitled to the Relief which he asks, so far as the Personalty is concerned.—[The *Vice-Chancellor* : The Bill does not allege that the Deed conveyed anything of a Personal nature ; the only Allegation as to its effect, relates to the Real Estate.]

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No Trust is *declared* of the Property for the Benefit of Mrs. *Hubert* ; it is merely implied : and, under the Statute of Frauds, no Relief can be obtained in respect of an Implied Trust. The Deed is void under the 13th Eliz. chap. 5, *Taylor v. Jones* (e), *Cadogan v. Kennett* (f).

Mr. *Turner*, in reply :

It has been said that the Deed is void, under the 13th Eliz. chap. 5 : but the Plaintiff cannot seek the Aid of that Statute, until he has obtained Judgment in his Action. It was also said that the Deed prevents the Plaintiff from obtaining, at Law, the Relief which he asks. But, if he takes out a special *Capias*, the Deed and all the Circumstances connected with it, may be stated in the return to the Writ, and the Court of Law will then decide as to the validity of the Deed. The Plaintiff cannot maintain any Interest either in the Real or in the Personal Estate, until he has obtained a Grant from The Crown.

(c) Hardres. 22.

(e) 2 Atk. 600.

(d) Maclel. & Youn 196.

(f) Cowp. 432.

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The *Vice-Chancellor*, after taking time to consider the Case, said that, as the Plaintiff had not obtained a Grant from The Crown, he had no Interest in the Property to which the Bill related, and, therefore, the Demurrer must be allowed (g).

(g) See *Balch v. Wastall*, 1 P. W. 445 ; and ——— v. *Bromley*, 2 P. W. 269.

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 18th, 21st, 22d
 & 23d July,
 and 23d Dec.

WARDLE v. CARTER.

*Reversion.
 Vendor and
 Purchaser.*

A. was entitled, for the joint Lives of himself and his Father, to a Rent-charge of 500 *l.* charged on an Estate of which his Father was Tenant for Life, with Re-
 mainder to *A.*

in Fee. *A.* having agreed to sell to *B.* a *perpetual* Rent-charge of 500 *l.* issuing out of the Estate, assigned to *B.* the Rent-charge to which he was so entitled, and conveyed his Reversion in Fee, to Trustees, in Trust, to secure to *B.* a Rent-charge of 500 *l.* a year, to commence on the Termination of the prior Rent-charge. Held that the Transaction was not to be considered as a Sale of an Interest in Reversion, as *A.*, when he made the Agreement, had it in his power to secure to *B.* a perpetual Rent-charge, of 500 *l.*, in Possession.

In determining whether a fair Price has been paid for a Reversionary Interest, the Market Value, and not an Actuary's Estimate, ought to be regarded.

THE Plaintiff was the eldest Son of *Gwyllyn Lloyd Wardle Esq.*: and under his Father's Marriage Settlement, he was Tenant in Tail, in remainder expectant upon his Father's decease, of an Estate in *Flintshire*, subject to a Rent-charge of 200 *l.* a year, payable to his Mother during the joint Lives of herself and her Husband, and to a Jointure of 300 *l.* a year, payable to her for her life, in the event of her Surviving her Husband, and to Two Terms of Years for securing those yearly Sums, and also to another Term for raising 5,000 *l.* for the younger Children of the Marriage. In 1822 the Plaintiff and his Father joined in suffering a Recovery of the

Estate; and thereupon a Rent-charge of 500 l., a year was limited to the Plaintiff, during the joint Lives of himself and his Father, and his Remainder in Tail was enlarged into a Remainder in Fee.

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In the early part of the Year 1827, *W. D. Bayley*, a Conveyancer, as the Agent and on the Behalf of the Plaintiff, offered to sell, to the Defendant *Carter*, a Perpetual yearly Rent-charge of 500 l., to be secured upon the Estate. *Carter*, at first, declined the offer; but, after some negotiation, he agreed to purchase the Rent-charge for 8,650 l.

A Memorandum of the Agreement, dated the 2d of April 1827, and in which the Plaintiff was described as the eldest Son and Heir-at-Law of *Gwyllym Lloyd Wardle*, was signed by the Plaintiff and *Carter*; and thereby the Plaintiff agreed to sell, and *Carter* agreed to purchase, for 8,650 l., a Perpetual yearly Rent-charge of 500 l., issuing out of the Estate, which the Plaintiff engaged was of the Yearly Value of 1,100 l. and upwards, and was of the value of 25,000 l. at the least, to be sold: and the Plaintiff agreed to deliver, to *Carter*, within one calendar month from the date thereof, an Abstract of his Title to the Rent-charge, and also, on or before the 12th day of May then next, upon receiving from *Carter* the 8,650 l., to execute to him, his Heirs and Assigns, a proper Grant and Conveyance of the Rent-charge; and that the same should be, at the time of the granting thereof, the first charge upon the Estate except the Jointure of 300 l. a year, and the Sum of 5,000 l.: and that the Conveyance should contain the usual Covenants for the Title, quiet enjoyment and further assurance of the Rent-charge: and that, upon the Execution of it, *Carter* should pay the 8,650 l. to

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the Plaintiff, and should, thereupon, be entitled to the Rent-charge from the 12th of May then next; and that, for the more satisfactorily securing it, the Plaintiff should convey all his Interest in the Estate and the Reversion in Fee therein expectant on the decease of his Father, (but subject as aforesaid, and also to the Rent-charge so to be granted,) to two Trustees, to be named by *Carter*, for the purpose of discharging, as speedily as might be and so far as the circumstances would allow, the said prior Incumbrances on the Estate, and for indemnifying *Carter* against the said Incumbrances and all Losses and Deficiencies that, by possibility, might arise in the Payment of the Rent-charge of 500*l*.

At the time when the Agreement was signed, the Plaintiff was about 29 years old; his Father was about 64, and his Mother about 58; and the Plaintiff was confined, for Debt, in the King's Bench Prison; but *Carter* did not become acquainted with that fact until a considerable time afterwards. On the 18th of July 1828, the Plaintiff was released from prison.

By Lease and Release dated the 30th and 31st of December 1828, after reciting the Agreement, and that, at the time when the Plaintiff entered into it, it was considered that he was entitled to the yearly Rent-charge of 500*l*. for the Life of his Father; and that it was, at that time, intended to make up the Perpetual yearly Rent-charge of 500*l*. agreed to be sold to *Carter*, by transferring to him the Rent-charge to which the Plaintiff was so considered to be entitled, and by granting, to *Carter*, a Perpetual yearly Rent-charge of 500*l*, out of the Estate, to commence upon the Decease of the Plaintiff's Father: but, inasmuch as, upon the investigation of the Plaintiff's Title, it had been discovered that he held the Rent-charge to which he was then en-

itled, for the joint Lives of his Father and himself only, it had been agreed, between him and *Carter*, that the Perpetual yearly Rent-charge agreed to be sold, should be made up by transferring, to *Carter*, the Rent-charge or held by the Plaintiff, and by securing, to *Carter*, a Perpetual yearly Rent-charge of 500*l.* to commence on the termination thereof, by the Trusts thereafter contained: and, inasmuch as the Estate was chargeable with the Payment of the yearly Sum of 200*l.* to the Plaintiff's Mother, during the joint lives of herself and her Husband, it had been agreed that such Indemnity should be granted, to *Carter*, in respect thereof as was hereinafter contained: It was witnessed that, in consideration of two Sums, amounting together to 5,500*l.*, paid, by *Carter*, by the Plaintiff's direction, to two persons to whom the Plaintiff had mortgaged his Rent-charge, and of 3,150*l.* paid by him to the Plaintiff, the Rent-charge, to which the Plaintiff was then entitled as aforesaid, was assigned to *Carter*, To hold the same to him, his Heirs and Assigns, for the joint lives of the Plaintiff and his Father: and the Plaintiff conveyed his Reversion in the Estate, to Trustees in Fee, upon certain Trusts for securing to *Carter*, his Heirs and Assigns, a Perpetual yearly Sum of 500*l.*, to commence on the termination of the Rent-charge before assigned, and for indemnifying him and them from the yearly Sums of 200*l.* and 300*l.*, and from the gross sum of 5,000*l.*: and the Trustees were empowered to sell the Reversion, if required for the purposes aforesaid.

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Although these Deeds were dated in December 1828, they were not executed until the 17th of March 1829.

The Bill, which was filed in Trinity Term 1832, alleged that the Plaintiff, when he signed the Agree-

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ment and executed the Deeds, was in distressed circumstances and without professional assistance, and that the 8,650*l.* was greatly below the value of the Rent-charge sold to *Carter*: and it prayed that the Agreement and the Deeds might be declared fraudulent and void, and might be delivered up to be cancelled.

The Plaintiff's Father died in 1833.

The Allegations of fraudulent conduct on the part of *Carter*, were not only wholly disproved, but it appeared that, throughout the transaction, the Plaintiff had the advice and assistance of his own Counsel and Solicitor, and that his Father's confidential Agent and Solicitor assisted in the completion of the Agreement.

In support of the Allegation that the Rent-charge had been sold at an Undervalue, two Actuaries were examined, both of whom deposed that, in *April* 1827, the value of a yearly Rent-charge of 500 *l.*, secured on Lands of ample value, was 12,500 *l.*: but, on their cross-examination, they said that they were unable to set forth what was the Market Value or the Price by Public Auction, in *March* or *April* 1827, of a Perpetual Rent-charge of 500 *l.*, being the first Charge upon Farms and Lands of the yearly Value of 1,100 *l.*, during the Life of a Person aged about 64, and being, upon his Decease, a Charge upon the same Farms and Lands, subject, only, to prior Charges of 300 *l.* per annum for the Life of his Wife, aged about 58 years, in case she should survive him, and of 5,000 *l.* to be raised upon his Decease.

On behalf of *Carter*, it was proved that, in 1826, the Plaintiff had attempted to sell the Rent-charge for 10,000 *l.*, but without success.

Two Auctioneers and a Surveyor were also examined on his behalf. One of them deposed that, in *March* or *April* 1827, the Market Value, or Price by Public Auction, of a Perpetual Rent-charge of 500 *l.*, circumstanced as was the Rent-charge purchased by *Carter*, was 9,000 *l.*: another deposed that it was between 8,000 *l.* and 8,500 *l.*: and the third, that it was 8,111 *l.*: and they added that the Contingency of a Person aged 29 and in good health, dying in the Lifetime of a Person aged 64, was so remote, that it was scarcely, if at all, to be regarded.

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Sir *William Horne* and Mr. *Koe*, for the Plaintiff, said that the Plaintiff was described, in the Agreement, as the eldest Son and Heir-at-Law of his Father; that he had no Interest in Possession, except the Rent-charge of 500 *l.* a year, which was given to him for his maintenance; that, as the Plaintiff had conveyed his Reversion to Trustees, in Trust to sell, in case he died in his Father's Lifetime, and, out of the Proceeds, to purchase an Annuity of 500 *l.*, to commence on the Plaintiff's Death, the Plaintiff had, in fact, sold his Reversion to *Carter*; that the Case was analogous to *Earl Portmore v. Taylor* (a), in which case Lord *Portmore* sold an Interest in Possession, as well as an Interest in Reversion; that the Value of the Rent-charge was proved, by the Actuaries, to be 12,500 *l.*; and that there was an enormous difference between the Value and the Price given.

Mr. *Knight* and Mr. *James*, for the Defendant *Carter*:

This is not a Case in which the Rules of this Court with respect to Sales of Reversions, are properly appli-

(a) *Ante*, Vol. IV. p. 182.

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cable: where the Interest in Possession and the Interest in Reversion, are sold together, those Rules do not apply. If a Tenant for Life and the Reversioner join in a Sale, the Reversioner is not entitled to the Relief which this Court affords to Persons who deal with their Expectancies: the transaction is treated, altogether, as a Sale of an Interest in Possession. In *Portmore v. Taylor*, there was a very small Interest in Possession in one thing, and a large Interest in Reversion in another; and, according to the doctrine laid down by Lord *Eldon* C., in *Davis v. The Duke of Marlborough*, and acted upon by your Honor, in *Portmore v. Taylor* (b), the mere throwing in of something colourable by way of Interest in Possession, will not prevent the application of the Rules of this Court with respect to Sales of Interests in Reversion. Besides, in that case; Lord *Portmore* was Heir to an Earldom, and was in great distress, which, *Bruce*, the Purchaser, took advantage of: *Bruce* too was, to a certain extent, the Agent of Lord *Portmore*, and a long and entangled Account subsisted between them: and, in addition to the Actuary's Evidence of Value, it was proved that *Bruce* had refused to take a very considerable Sum for the Interests purchased by him. Here the thing originally contracted for, was a Perpetual Rent-charge of 500*l.* a year in Possession: it was one, entire subject. The Plaintiff, when he entered into the Contract, had, substantially, a Perpetual Rent-charge of 500*l.* a year in Possession: for the Auctioneers prove that the possibility of his dying before his Father, was so remote, that it ought to be disregarded: at all events he had the Power of securing, to the Defendant, a Perpetual Rent-charge in Possession. Moreover, the confidential Agent and

(b) See 2 Swanst. 154.

Solicitor of the Plaintiff's Father, was privy to the Transaction, and assisted in carrying it into effect.
King v. Hamlet. (c)

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Next, as to the subject of Value. The only Evidence which the Plaintiff has given on that subject, is the Evidence of two Actuaries. They depose to the Value of the Rent-charge according to the Tables, and not to the Price which it would fetch in the Market. We have examined Auctioneers; and one of them says that its Value was 9,000*l.*; another, that it was 8,500*l.*; and the third, that it was 8,111*l.* If we add those three Sums together, and divide the amount by three, we shall find that the Average is 8,537*l.*, which is upwards of 100*l.* less than the Price paid by *Carter*. In *Headen v. Rosher* (d), *Alexander*, C. B., expresses it to be his opinion that the principle laid down, by Sir *W. Grant*, Master of the Rolls, in *Gowland v. De Furia* (e), was not sustainable. In *Potts v. Curtis* (f), (in which case the Party complaining of the Sale, was the Defendant,) Lord *Lyndhurst*, C. B., adopted the principle on which the question of Value was decided in *Headen v. Rosher*. In this Case, the Actuaries state the Value of the Rent-charge to be 12,500*l.* Take off one-third, according to the rule laid down by Lord *Lyndhurst* in *Headen v. Rosher*, and the Value will be 8,334*l.*: so that it is clearly established that *Carter* gave more than the fair Value of the Rent-charge.

Mr. *Stuart* appeared for the Defendants, the Trustees.

(c) 2 Myl. & Keen, 456. See 473.

(d) Maclel. & Youn. 89. See 99. (e) 17 Ves. 20.

(f) 1 Youn. 543.

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The VICE-CHANCELLOR:

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As the Allegations in this Bill tend to affect the Character of Mr. *Carter*, I will read over the Bill and Answers and the whole of the Evidence, before I give my decision.

23d Dec.

The VICE-CHANCELLOR:

In this Case, the Bill is filed for the purpose of setting aside certain Deeds which were executed, in fact, in the year 1829, though they were dated in 1828; and the Bill is filed under these circumstances. At the time when the Agreement which is mentioned in the Pleadings, was entered into, the Estate in question, which is an Estate called *Hartsheath*, in the county of *Flint*, stood settled in this manner; that is, it was subject to the Payment of 200*l.* a year, by way of Pin-money, to Mrs. *Wardle*, the Mother of the Plaintiff, and, subject thereto, it stood charged with an Annuity of 500*l.* a year during the joint Lives of the Plaintiff and of his Father: and it then was settled to the Use of the Father, for life, with remainder to the Use that, if the Mother survived the Father, she should receive a Jointure Rent-charge of 300*l.* a year, and it was also subject to the Sum of 5,000*l.* charged upon it by way of Portions for younger Children, and, subject thereto, the Estate was vested in the Plaintiff in Fee. In that situation of the Property, the Plaintiff, who was in prison at the time and in distress, entered into an Agreement, bearing date the 2d of April 1827, for the Sale, to the Defendant, of a Perpetual Rent-charge of 500*l.* a year: and it is observable that, although, at the time when the Agreement was made, the Plaintiff had not, actually, a

perpetual Rent-charge of 500*l.* a year, yet he had, *sub modo*, and with a slight degree of qualification, a Power to grant to any Person, in effect, a Perpetual Rent-charge of 500*l.*, a year: for he might have assigned the Rent-charge of 500*l.* a year which he held during the joint Lives of himself and his Father, and might have made his Reversion in Fee expectant upon the Death of his Father, available to pay a Perpetual Rent-charge of 500*l.* a year after the Death of his Father, and might, by a little machinery, have made the Reversion itself available to supply, in effect, the Payment of the Sum of 500*l.* a year during the interval that would occur between his own death and the death of his Father, in the event of his dying before his Father.

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v.
CARTER.

[His *Honor* then stated, in detail, the Allegations, in the Bill, that *Carter* had taken advantage of the Plaintiff's distressed circumstances, and of his being without professional assistance, and the Evidence relating to those Allegations; and, after observing that they were completely disproved, proceeded thus:] So that it appears that the Plaintiff had, not only the advice and assistance of his own Professional Advisers, but all the protection that could arise from making the confidential Agent and Solicitor of his Father privy to the transaction.

Then a complaint is made, in the Bill, on the ground of want of Value: and, on the part of the Plaintiff, two gentlemen are examined as to the Value of the Perpetual Rent-charge of 500*l.* a year; and they both, singularly enough, concur in stating (probably they looked only at the Tables) that 12,500*l.* was the Value of the Rent-charge in 1827. These gentlemen were cross-examined as to the question of Market Value: with respect



charge was 9,000 l.; another states it was fixed to 8,500 l.; and the third states that it was. These two last witnesses add that their valuation was made with reference to the state of the Market (which is a very material circumstance) in the year of 1827, which, they say, was a very unfavorable time for the Sale of Property, such as the Real Estate in question.

Now the Price that was actually given, which was more than the average Price, to the testimony given by the Defendant's witnesses, and more than two-thirds of the Price was proposed to by the Plaintiff's witnesses, who speak of a general Value only, and not as to Market Value. It appears too, by the Evidence, that, in the attempts had been made to sell the Property, the charge for 10,000 l.; but no person could be found who would purchase at that price. It, therefore, seems to be perfectly plain that no fault is to be attributed to this Contract in respect of Deficiency of Price.

The Plaintiff certainly did file his Bill for the Lifetime of his Father; and, at that time, it was said that he had an Interest in Reversion: but, in the Nature of the Estate which he had, it is, in my opinion, plain that he stood in the situation of a purchaser, and if the Purchaser did not make the objection

part of Mr. *Carter*, are most unfounded, and that the Plaintiff has no right whatever, in Equity, to dispute this Conveyance; and, consequently, the Bill must be dismissed with Costs.

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v.
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MILLS v. MILLS.

1835:
23d July.
Will.
Construction.
Residuary Gift.

JOHN MERRIS, by his Will dated the 10th of April 1819, after giving a Legacy of 10*l.* and an Annuity of 50*l.* to *Hannah Stevens*, gave all his Freehold and Leasehold Messuages, Tenements, Farms, Lands and Hereditaments, and all his ready Money, securities for

Testator gave all his Freehold and Lease-

hold Messuages, Lands and Hereditaments, ready Money, Securities for Money, Stock in the Public Funds, Goods, Chattels and Effects, and all other his Real and Personal Estate and Effects, to Trustees, in Trust to pay the Rents of his Freehold and Leasehold Estates, and the Dividends, Interest and Proceeds of his Money in the Funds and other his said Personal Estate, to his Daughter for life, and, after her death, to stand possessed of his said Freehold and Leasehold Estates, Money in the Funds, and all other his said Real and Personal Estate, for the Children of his Daughter; and, in default of such Children, in Trust to pay the Rents of his said Freehold and Leasehold Estates, and the Dividends, Interest and Proceeds of his said Stock in the Funds and other his said Personal Estate, to his Nephews, for their lives, and, after their deaths, in Trust to stand possessed of his said Freehold and Leasehold Estates, Money in the Funds and other his said Personal Estate, for their Children; and, in default of such Children, he gave his said Freehold and Leasehold Estates, Stock in the Public Funds and all other his said Real and Personal Estate, to the Corporation of *S.*, in Trust, as soon as conveniently might be after they should come into Possession thereof, to sell his said Freehold and Leasehold Estates, and also to sell, call in and convert into Money his said Stocks in the Public Funds and all other his said Personal Estate, and to lend the same to certain Persons upon the Terms therein mentioned. The Testator, at the date of his Will and at his death, was possessed of Leasehold Estates, Turnpike Securities, Bank Stock, and other Personal Estate. Held that the Bequest to the Trustees was a general Residuary Bequest, and that the Leaseholds and Bank Stock ought to be sold, and the Proceeds invested in Three per Cents.; and an Inquiry was directed, whether the Turnpike Securities were Real and Permanent Securities.

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Money, *Stocks in the Public Funds*, Goods, Chattels and Effects, and all other his Real and Personal Estate and Effects, whatsoever and wheresoever, to *J. Tanner*, since deceased, and the Defendants *Budd* and *Blackmore*, absolutely, in Trust to pay the Rents, Issues and Profits of his Freehold and Leasehold Estates, and the Dividends, Interest and Proceeds of *his Money in the Funds and other his said Personal Estate*, unto his Daughter, the Plaintiff, *Eliza Mills*, for her separate Use, for her Life, and, after her decease, in Trust, out of the Rents and Profits of his said Freehold and Leasehold Estates and the Dividends, Interest and Proceeds of *his said Money in the Funds and all other his said Real and Personal Estate and Effects* thereinbefore given and devised as aforesaid, to pay unto any Husband of his Daughter that should be living at her decease, an Annuity of 500 l., for his Life, and, subject thereto, in Trust to stand possessed of *his said Freehold and Leasehold Estates, Money in the Funds and all other his said Real and Personal Estate*, for all the Children of his Daughter who should be living at her decease, and who, being Sons, should attain 21, or, being Daughters, should attain that age or marry: provided that, if any of his Daughter's Children should marry in her Lifetime and die under 21 leaving a Child or Children, then such Grandchild or Grandchildren of his Daughter should receive the Share or Shares of *his said Estate and Effects* on attaining 21 being a Son or Sons, or, being a Daughter or Daughters, on attaining that age or marrying, which his, her or their Parent or Parents would, if living, have been entitled to: and the Testator empowered his Trustees, after his Daughter's death, to apply the Rents and Profits, Interest, Dividends and yearly Proceeds of the Shares of the Infant Children or Grandchildren, of his Daughter, of and in his said Estates and Effects, for

their Maintenance and Education, or to apply their Shares of and in his said Estates and Effects, for their advancement: and, in case no Child or Grandchild of his Daughter should live to have a vested Interest in his said Freehold and Leasehold Estates, and his said ready Money and other his said Personal Estate, then upon Trust to stand possessed of 5,000 *l.*, part of his said Stock in the Funds, and other his said Personal Estate and Effects, in Trust for such Persons as his Daughter should, by her Will, appoint, and, in default of appointment, the Testator directed that the 5,000 *l.* should be considered part of his Residuary Personal Estate thereafter bequeathed. And he directed that the Trustees should stand possessed of 500 *l.*, further part of his said Money in the Funds and other his said Personal Estate and Effects, in Trust for *Martha Lewis* and of 2,000 *l.*, further part of his said Stock in the Funds and other his said Personal Estate and Effects, in Trust to pay the Dividends, Interest and Proceeds thereof to his two Daughters of *Martha Lewis* for their Lives, and, after their deaths, to pay the Principal to their Children, at the usual times; and in case no Child should live to have a vested Interest therein, then that the Principal should sink into the Residuum of his said Estate and Effects thereafter bequeathed. And, in case of Failure of Issue of his Daughter *Eliza Mills* as aforesaid, he directed that the Trustees should pay the Rents, Issues and Profits of his said Freehold and Leasehold Estates and the Dividends, Interest and Proceeds of his said Stock in the Funds and all other the Residue of his said Personal Estate, to his Nephews therein named, for their Lives, and to the Survivor of them, for his Life; and that, after the death of the Survivor, the Trustees should stand possessed of his said Freehold and Leasehold Estates, Money in the Funds and all other the

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Residue and Remainder of his said Real and Personal Estate, in Trust for the Children of his Nephews who should be living at the decease of such Survivor, as Tenants in Common absolutely; and if, there should be no such Child, then that his Trustees should stand possessed of 3,000*l.*, Part of the Residue and Remainder of his said Estate and Effects, for their own Use, and of 1,000*l.* further Part thereof, in Trust to pay the same to the Treasurer of the *Salisbury* Infirmary: and, subject to the above Payments, and in the event of there being no Child of either of his Nephews, who should be living at the death of the Survivor of them, he gave all the Residue and Remainder of his said Freehold and Leasehold Estates, Stock in the Public Funds, and all other his said Real and Personal Estate, to the Corporation of *Salisbury*, in Trust, as soon as conveniently might be after they should come into Possession thereof, to sell and dispose of his said Freehold and Leasehold Estates, and convert the same, also to sell, call in and convert into Money, his said Stocks in the Public Funds and all other his said Personal Estate, and to lend the same to the Persons, in the Sums, and upon the Terms, therein mentioned.

The Testator died in March 1824.

The Bill was filed by the Infant Children of Mr. and Mrs. *Mills*, against their Father and Mother and the Trustees, who were also the Executors of the Will, praying that the Residue of the Testator's Estate might be ascertained and secured for the Benefit of the Parties interested therein, and that the Leasehold Estates, Bank Stock and Turnpike Securities, of which the Testator died possessed, might be sold, and the Proceeds invested in the Three per Cents.

It appeared, by the *Master's* Report made in pursuance of the Decree on the hearing of the Cause, that the Stock of which the Testator was possessed at the date of his Will, consisted of the Reversion of 3,648 *l.* Consols, expectant on the decease of one *Shergold*, and of 13,000 *l.* Bank Stock; and that, at his death, the Reversion had fallen into Possession, and his Bank Stock amounted to 14,800 *l.* The Testator's Leasehold Estates, Turnpike Securities, Consols and Bank Stock, remained unsold, and Mrs. *Mills* had received the Income thereof from the Testator's death.

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The Cause now came on for further Directions: the question was, whether the Leaseholds and Bank Stock were specifically bequeathed to the Trustees upon the Trusts of the Will.

Mr. *Jacob* and Mr. *James Russell*, for the Plaintiffs, contended that the Bequest to the Trustees, was a general Residuary Bequest, containing an enumeration of some of the particulars of which the Residue consisted: that Bank Stock was nothing more than a Share in the Stock of a Trading Company, and passed, to the Trustees, under the words: "Goods, Chattels and Effects," and not as, "Stock in the Public Funds:" that the Trustees ought to have sold the Bank Stock and the Leaseholds, and invested the Proceeds in the Three per Cents.; and that, as the Rents and Dividends which had been received by Mrs. *Mills*, exceeded, in amount, the Dividends of the Stock in which the Proceeds ought to have been invested, the Excess ought to be refunded by her. *Stirling v. Lydiard* (a), *Gibson v. Bott* (b), *Howe v. Earl Dartmouth* (c).

(a) 3 Atk. 199.

(b) 7 Ves. 89.

(c) Ibid. 137. See also *Bridges v. Bridges*, 8 Vin. Ab. Tit.

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Sir C. Wetherell, Mr. Beames and Mr. O. Anderson, for the Defendants, Mills and Wife.

The words used by the Testator, in speaking of his Stock, are not, "Stock in the *Government Funds*," but "Stock in the *Public Funds*:" these latter words will pass the Bank Stock, which was the bulk of the Testator's Property. He had a Sum in the Three per Cent; but it was, comparatively, of small Amount; and, at the date of his Will, his Interest in it was *Reversionary* only.

It is clear, from the Language of the Will, that the Testator intended that his Property should be enjoyed by his Daughter, as it existed at the date of his Will. There is no direction to sell any part of it during the continuance of the Trusts. When the Bequest to the Corporation of *Salisbury* takes effect, then and not before, the Property is to be converted into Money. When the Testator directs the Trustees to stand possessed of the 5,000*l.*, he adds, "Part of my said Stock in the Funds;" and, throughout his Will, he uses the expressions "my said Stock," or, "my said Money in the Public Funds;" and, after giving the Legacies, he gives the Residue of his said Stock in the Funds to the Corporation. It is clear, therefore, that he intended his Bank Stock to remain *in specie*, so long as the Trusts continued.

The VICE-CHANCELLOR :

When the Testator provides for the raising of the 5,000*l.*, in the event of his Daughter having no Child who should attain a vested Interest, he does not say,

Devise, p. 295, pl. 13; *Chalmers v. Storil*, 2 V. & B. 222; and *Taylor v. Taylor*, ante, Vol. VI. p. 246.

merely: "Part of my said Stock in the Funds," but adds, "and other my said Personal Estate and Effects."

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v.

MILLS.

The Cases cited differ essentially from the present. In *Stirling v. Lydiard*, the question was whether the Bequest of the Leasehold Estate was revoked by the renewal of the Lease. In *Gibson v. Bott*, the Bequest was of all the *rest, residue and remainder* of the Testator's Goods, Chattels, &c. to the Executors, upon Trust, as soon as conveniently might be after the Testator's death, to sell and convert into Money all such parts thereof as should not consist of Money. In *Howe v. Lord Dartmouth*, the Testator bequeathed all his Personal Estate whatsoever; and, consequently, there was no ground for contending that anything was specifically given.

Mr. Wray appeared for the Trustees of the Will.

THE VICE-CHANCELLOR:

The Testator has first given, to his Trustees, all and every his Freehold and Leasehold Messuages, Tenements, Farms, Lands and Hereditaments whatsoever and wheresoever situated, and all and singular his ready Money and Securities for Money, Stocks in the Public Funds, Goods, Chattels and Effects, and all other his Real and Personal Estate and Effects whatsoever and wheresoever situate, lying and being, to hold unto and to the Use of the Trustees, their Heirs, Executors, Administrators and Assigns, according to the nature of his Estate and Interest therein, in Trust to pay the Rents, Issues and Profits of his said Freehold and Leasehold Estates, and the Dividends, Interest, and Proceeds of his Money in the Funds and other his said

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Personal Estate, unto his Daughter *Eliza*, for and during the term of her natural life. It is plain that he has, in this Clause, merely made a partial enumeration of the particulars of his general Residuary Estate; and there is no intention apparent in any other part of the Will, to give any Portion of his Personal Estate specifically. The words: "Stocks in the Public Funds," would not have passed the Bank Stock; and, but for the general words, it would not have passed at all.

When the Testator comes to speak of Children of his Daughter dying under 21 leaving Children, he says that such Grandchildren of his Daughter shall receive a Share of "his said Estate and Effects;" and, he uses this phrase several times afterwards. Where he speaks of no Child or Grandchild of his Daughter living to attain a vested Interest, he uses the expression, "my said ready Money and other my said Personal Estate." Is it not obvious that, when he uses these expressions, he is speaking of one and the same thing? And it does not appear that you can infer any intention that there should not be a Sale and Conversion into Three per Cents. according to the Rule of the Court, merely because, when he speaks of the period when, of necessity, there must be a Conversion into Money for the purpose of making the Loans, he declares that the Corporation, when it comes into possession of the residue of his Freehold and Leasehold Estates, Stock in the Public Funds, and all other his said Real and Personal Estate, shall sell and convert the same.

My Opinion is that you must, from looking at all the Phrases, conclude that he meant that there should be an Enjoyment of the Proceeds of his Personal Estate generally. And, unless the Bequest is construed as a

general Bequest, the consequence would be that, if he had surrendered the Leaseholds and taken Renewals, they would not have passed ; and, in like manner, if he had sold his Bank Stock and purchased other Bank Stock, it would not have passed.

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v.
MILLS.

The Leaseholds must be sold, and the Bank Stock also ; and that, not because it is not a Permanent Fund, but because it depends on the will of the Directors of the Bank, whether the casual Profits (which are full as valuable as the ordinary Profits) shall go to Tenants for Life, or shall form part of the Capital of the Stock ; and this Court will not allow the Interests of Tenants for Life and of Remainder-men to depend on the directions that the Bank may think proper to give respecting Bonuses.

The Tenant for Life must refund what she has received more than she would have received, if the Leaseholds and Bank Stock had been sold and the Proceeds invested in the Three per Cents. : and there must be an Inquiry whether the Turnpike Securities are Real and Permanent Securities, that is, whether they permanently yield the Interest that is payable on them.

1835 :
31st July.

Statute of
4 & 5 Will. 4,
c. 29.
Construction.

The 3d Section of 4 & 5 Will. 4, c. 29, enacts that, in certain Cases, Loans on Real Securities in Ireland, shall be made under the Direction of the Court of Chancery or Exchequer in England, to be obtained in any Cause upon Petition in a summary way. Held that the concluding part of the Section must be read thus: "in any Cause, or upon Petition in a summary way:" and that the proposed Securities must be approved of by the Master.

EX PARTE FRENCH.

UNDER the Settlement on the Marriage of T. G. French, of Marino, in the County of Cork, Esq., and Charlotte his Wife, dated in 1811, a Sum of 14,000l. Three per Cents. was held by Trustees, in Trust for Mr. and Mrs. French for their lives, and after the death of the Survivor, in Trust for the Children of the Marriage: and the Trustees were empowered to sell the Trust Fund, with the consent of Mr. and Mrs. French, and to invest the Proceeds in any other Stocks or Funds, or on Real Securities.

Mr. and Mrs. French presented a Petition under 4 & 5 Will. 4, c. 29, intituled "An Act for facilitating the Loan of Money upon Landed Securities in Ireland," praying that the Trustees might be authorized to sell the Trust Stock, and invest the Proceeds on Real Securities in Ireland.

The third Section of the Act provides that all Loans of Money on Real Securities in Ireland under the Act, in which any Minor or unborn Child or Person of unsound Mind is or may be interested, shall be made by the direction and under the authority of the Court of Chancery or Exchequer in England, such direction or authority being obtained in any Cause upon Petition in a summary way.

On the hearing of the Petition, one question was whether, under the Act, the Court had jurisdiction to make the Order except upon a Petition presented in a

Cause. Another question was whether the proposed Security must be approved of by the *Master*.

The *Vice-Chancellor* said that the concluding part of the third Section, ought to be read as follows: "in any Cause or upon Petition in a summary way:" and that there must be a Reference to the *Master* to approve of the Security.

The Order directed the *Master* to inquire and state whether it would be for the benefit of the Parties interested under the Settlement, that the 14,000*l.* Stock should be sold and the Proceeds invested, at Interest, in Real Securities in *Ireland*, upon the Trusts of the Settlement: and, if the *Master* should find that such an Investment would be for the benefit of the said Parties, then he was to inquire whether the proposed Securities were sufficient, regard being had to the Annual Value of the Property comprised in such Securities and to the Nature of the Tenure thereof: and the *Master* was to inquire and state whether a good Title could be made to the same: and, after the *Master* should have made his Report, such further Order was to be made as should be just.

Mr. *Walpole* and Mr. *J. Romilly* appeared upon the Petition.

1835.

Ex parte
FRENCH.

1835:
21st August.

Executors.
Probate.
Injunction.
Receiver.

Probate by one
Executor,
enures to the
Co-executors.

Although
Probate or Let-
ters of Admi-
nistration may
have been
granted, yet, if
a sufficient Case
is made for dis-
puting their
Validity, and a
Suit has been
commenced, in
the Ecclesias-
tical Court, for
the purpose of
having them
revoked, this
Court will pro-
tect the Pro-
perty of the
deceased, by
granting an In-
junction and
Receiver pend-
ing the litiga-
tion in the
Ecclesiastical
Court.

WATKINS v. BRENT.

TIMOTHY BRENT, Esq. died on the 27th of February 1833, leaving three Testamentary Papers in his own handwriting. The first was written on half a sheet of letter-paper and was without Signature. It was as follows: "I give and bequeath all I may die possessed of, to my Wife Mrs. *Margaret Brent*, both Freehold, Copyhold and Leasehold Estates, and all my Personal Property, of what nature or kind soever: and I appoint my said Wife and my Nephew *W. Brent Brent Esq.* Executrix and Executor of this my Will. Dated this day of December 1832."

The second Paper was written on a sheet of note-paper, and was in the following words:

"My dearest *William*,—My intention in this Paper is that if you can agreeably thereto arrange my Property among yourselves, under a Deed of Settlement or Gift from your Aunt, to escape the very heavy Legacy Duty of 10 per Cent. to you all, as she will pay no Tax but the Probate Duty. If you do not make such an Arrangement, this Paper must be made a Codicil to my Will, which I very much wish to avoid. May God bless you. Your affectionate Uncle,

Tim. Brent, Dec. 1832."

The third Paper was as follows: "Memorandum,—I have by my Will, dated as above, given the Property I may die possessed of, to my Wife Mrs. *Margaret Brent*: and my Desire is that she will continue

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v.
BRENT.

to pay, thereout, to Mrs. *Adeline Brent Barrington*, 200 *l.* a year; an Engagement I made and have fulfilled from the time of her Marriage. I also desire that 150 *l.* a-year may be regularly paid to Mrs. *Mary Foote*, her Mother, during her life, and that a Bond of 100 *l.* from Miss *Waring*, may be assigned over to her. My further request is that my said Wife do, during her life, make a Settlement of all the Property she may be possessed of through me, in Trust to *William Brent Brent*, Esq. to retain, to his own Use, One-third part thereof; for the Use of his Sister, *Sarah Holmes Burdett*, One-third part; and *Adeline Brent Barrington*, One-third part thereof: this last Share to be settled upon her independent of any Coverture, with Remainder to her Mother, for her life, and, at her death (should she survive her Daughter, Mrs. *Adeline Brent Barrington*) with Remainder to *William Brent Brent* Esq. and *Sarah Holmes Burdett*, in equal Moieties for ever. In explanation, I desire it may be arranged, in settling the Property as before mentioned, that, when *Adeline Brent Barrington* shall come into and be in Possession of One-third thereof, that the Allowance previously made to her of 200 *l.* a year, shall cease: and, in like manner, the 150 *l.* a year to Mrs. *Mary Foote*. My desire also is, that 1,000 *l.* of Bank Stock be applied to the use of my Wife, Mrs. *Margaret Brent*, as a Fund for herself solely to expend as she may think proper, and to meet any Excess she may incur, at any time, beyond her Income, from any unavoidable circumstance of illness or otherwise. I do also request that no interference whatever may be had to interrupt my said Wife in the management of the Property I have given to her, unless any wilful neglect shall happen therein, or it shall appear to be allowed to fall into a state of dilapidation or decay. As my anxious

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BRENT.

view in these Memorandums, is to the natural state, the peace, happiness and harmony of my Family; I request that my Nephew, *William Brent Brent*, in whom I have the most implicit confidence for integrity and honour, should be sole Arbitrator of any question that may arise as to my Intentions herein, and that any one or more of the Parties pursuing, by Process of Law, any Question whatever, shall lose and forfeit their Interest herein."

Timothy Brent left *James Bligh* and *Richard Bligh* his Next of Kin. Mrs. *Brent* having been advised that the Papers ought to be brought before the Prerogative Court and its Opinion taken as to their validity, caused the Next of Kin to be cited to appear and see Proceedings in respect of the Papers. An Allegation was, accordingly, given in, propounding the Papers as the Will and Codicils of *Timothy Brent*. The admission of the Allegation was opposed by the Next of Kin; but the Judge of the Court admitted it to proof, and directed that upon proof, by Affidavit, of the necessary Facts stated in it, and with the consent of the Next of Kin, Probate of the Papers might pass under Seal. The Next of Kin, having seen the Affidavits made as to certain Facts pleaded in the Allegation, and as to the Handwriting of *Timothy Brent*, declined to proceed any further in the Suit; and, on the 27th of June 1833, Probate of the Papers was decreed to Mrs. *Brent* and the Defendant *W. B. Brent*; and, a few days afterwards, Probate was granted to Mrs. *Brent*, with power reserved to *W. B. Brent* to come in and Prove.

James Bligh died in August 1834: the Plaintiff, Mrs. *Watkins*, was his Residuary Legatee, and the De-

CASES IN CHANCERY.

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Defendant, Bedford, his Executor. Richard Bligh died on November 1834: the Plaintiff, *Richard Bligh*, was his Executor.

1835.

WATKINS

v.

BRENT.

In February 1835, the Plaintiffs, who alleged that the Consent of *James Bligh* and *Richard Bligh* deceased, to the passing of Probate, was obtained by contrivance and misrepresentation on the part of Mrs. *Brent* and *Wm. B. Brent*, obtained, *ex parte*, from the Prerogative Court, a Monition calling on Mrs. *Brent* to show Cause why she should not bring in the Probate, and prove the Papers, in solemn form, *per testes*, otherwise to show cause why they should not be pronounced invalid and the Probate thereof be revoked. In April 1835 Mrs. *Brent* appeared to the last-mentioned Suit; and, in June following pending the Proceedings in it, she died Intestate. *W. B. Brent* took out Administration to her. Shortly after Mrs. *Brent's* Death, the Plaintiffs entered a Caveat against the granting of Probate of the Papers to *W. B. Brent*: but, afterwards, by agreement between the Proctors for the respective Parties, the Proceedings commenced against *W. B. Brent* were discontinued, and he was made a Party to the Suit against Mrs. *Brent*.

In July 1835, the Bill was filed alleging that the Testamentary Papers were imperfect, deliberative and invalid, and that the Consent of *James Bligh* and *Richard Bligh*, deceased, to the passing of Probate, was obtained by contrivance and misrepresentation, and praying for an Account of *T. Brent's* Personal Estate, and that the same might be sold and the Produce secured for the benefit of the Persons who should be decreed, by the Ecclesiastical Court, to be entitled thereto: and that *W. B. Brent* might be restrained from transferring any of the Stock

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BRENT.

belonging to *T. Brent's* Estate, and that a Receiver might be appointed of his outstanding Estate.

The Plaintiffs having obtained an Injunction as prayed by the Bill, *W. Brent Brent*, now moved to dissolve it: and, at the same time, the Plaintiffs moved for a Receiver. *W. B. Brent* made an Affidavit positively denying that the consent of the Next of Kin to the passing of Probate, had been unfairly obtained.

Mr. Knight, Mr. G. Richards and *Mr. Stevens* for the Defendant *W. B. Brent*, said that Probate by one Executor, enured to the Co-executors, and, therefore, *W. B. Brent* was, completely, the Personal Representative of *Timothy Brent*: that, where there was an existing Personal Representative, the Court never interfered to prevent his collecting the Assets, unless a special Case was made: that, in this Case, the Next of Kin had been cited, and, at first, opposed the granting of Probate to *Mrs. Brent*, but, afterwards, on being satisfied with the Evidence that was adduced, they withdrew their Opposition and consented to Probate being granted to her; and that the Allegation that the Next of Kin were improperly induced to withdraw their opposition, was positively denied by the Affidavit of *W. B. Brent*. *Jones v. Frost (a)*.

Mr. Kindersley and *Mr. Bligh*, for the Plaintiffs, said that, although Probate had been granted, the Court would interfere to protect the Assets of the Deceased, whenever there was a Litigation pending in the Ecclesiastical Court, the result of which might be to decree that the Deceased had died Intestate, and, consequently,

(a) 3 Madd. 1. Affirmed by Lord *Eldon*, C. Jac. Rep. 466.

at the Defendant was not, properly, his Executor ; and that it was not necessary to show that the Defendant was insolvent, or had been guilty of Fraud. *Ball v. Oliver* (b), *Atkinson v. Henshaw* (c), *King v. Knight* (d), *Andrews v. Powys* (e).

1835.
WATKINS
v.
BRENT.

Mr. Knight, in reply said that, in *Andrews v. Powys*, the first Probate was granted without any citation of the testator's Next of Kin ; that the grounds of the Decision were not stated ; but it was sufficient for him to show that that Case might have been decided on its special circumstances : and that it was clear, from the language used by Lord Eldon and Sir Thomas Plumer, in *Atkinson v. Henshaw* and *Ball v. Oliver*, that those Cases were decided on their special circumstances.

The VICE-CHANCELLOR :

I agree, with the Counsel for the Defendant, that, if the Executor proves the Will, the Proof enures to the co-executors ; although it is usual, I believe, for Counsel to advise every Executor, before he Acts, to prove the Will. I must, therefore, take it, as a fact in this case, that there is a Probate actually existing. The question then is whether it sufficiently appears that there is a fair ground for disputing the Validity of the Probate.

I confess that, in my Opinion, there was a fair *substratum* for contesting whether Probate of these Papers ought to have been granted originally : and Probate of them was granted, not on their being considered to be valid Testamentary Instruments, but on the Next of Kin withdrawing their Opposition and consenting that Probate should pass. A Suit is now pending in the Eccle-

(b) 2 V. & B. 96.
(c) Ibid. 85.

(d) 6 Ves. 172.
(e) 2 Bro. P. 6, 504.

1835.

WATKINS

v.

BRIST.

siastical Court, in which there are two questions for consideration: one is the sufficiency of the Papers set up as testamentary: and the other is, whether the Consent of the Next of Kin was fairly obtained. I am not at liberty to deal with either of those questions: it is strictly within the province of the Ecclesiastical Court to determine them. But when I see that there was a weak Case for granting Probate originally, and that a Suit has been commenced in the Ecclesiastical Court, in which the circumstances under which that Probate was obtained, are, *bonâ fide*, in dispute, I think that there is a sufficient ground for the interference of this Court; it being a general principle that, notwithstanding there may be a Probate (as in *Andrews v. Powys*) or Letters of Administration (as in *Ball v. Oliver*) in existence, if a sufficient Case is made for disputing their validity, and a Suit has been commenced in the Ecclesiastical Court for that purpose, this Court will interfere to protect the Property, by granting an Injunction and Receiver pending the Litigation in the Ecclesiastical Court. The consequence is that, in this Case, the Injunction must be continued, and the Receiver must be granted.*

* Affirmed by the Lords Commissioners. See 1 Myl. & Craig, 97.

GODSON vs. COOK.

Suit related to Lands in *Middlesex*. The Defendant was resident at *Ghent* in *Belgium*, and had been there with a Subpoena to appear to and Answer under 4th & 5th Will. 4, c. 82. The Defendant having appeared, an Appearance was entered under that Act. No Answer having been put, Plaintiff proceeded to take the Bill *pro confesso* in the same manner as he might have done if the Defendant had been served with the Subpoena within the jurisdiction of the Court. The Registrar declined to draw up the Decree, on the ground that personal notice ought to have been given, to the Defendant, of the application for Process subsequent to the issuing of the Subpoena.*

Jacob and Mr. *Keene*, for the Plaintiff, now asked that the Registrar might be directed to draw up the Decree. They said that, under the concluding words of the first Section of the Act: "and, thereupon, it may be lawful for such Courts respectively to proceed upon such Service so made as aforesaid, as if the same had been duly made within the Jurisdictions of such Courts respectively," the Plaintiff was at liberty to proceed to take the Bill *pro confesso*, according to the usual course of the

1837.
19th June

Practitioner.
Pro Confesso.
Process.

Where a Subpoena has been served upon a Defendant, resident Abroad, and an Appearance has been entered for him, under 4 & 5 Will. 4, c. 82, the Plaintiff may proceed to take the Bill *pro confesso* against him for want of Answer, in the same manner as if the Subpoena had been served within the Jurisdiction of the Court.

Vice-Chancellor expressed himself to be of that opinion, and directed the Decree to be drawn up (a).

(a) See *Daniell's Pract.* 281.

See *Hasluck v. Stewart*, ante, Vol. VI. p. 321. It will be observed that, in that Case, the Subpoena had been served under 2 & 3 Will. 4, c. 33.

1837:
7th July.

Short Cause.

The Court will not order a Cause to be heard as a Short Cause, although the Plaintiff and all the Defendants but one, consent to its being so heard.

KER v. CUSAC.

ONE of the Defendants having refused to allow this Cause to be heard as a Short Cause,

Mr. *Girdlestone*, for the Plaintiff, now moved that it might be set down to be heard on the next day appointed for hearing Short Causes, or that he might be at liberty to give a Notice of Motion calling on the Defendant to show cause why the Cause should not be so set down. He cited *Mountford v. Cooper (a)*.

The *Vice-Chancellor* said that he could not order a Cause to be heard as a short Cause, without hearing a previous Discussion as to whether the Cause was proper to be so heard, which would be attended with great inconvenience, as it would involve a discussion of the question in the Cause.*

(a) 1 Keen. 464.

* The Defendant afterwards consented, and the Cause was heard as a Short Cause on the 14th of July 1837.

POOLE v. MARSH.

1837:
7th July.

Practice.
Demurrer.
New Orders.

THE Defendant not having Pleaded, answered or demurred within eight days after he had appeared to the Bill, the Plaintiff obtained an Order for the Common Injunction.* Afterwards, but before the 12 days had expired, the Defendant filed a Demurrer.

Defendant demurred to the Bill, within the 12 days allowed by the 10th of Lord Brougham's Orders, but after the Plaintiff had obtained the Common Injunction. Held not to be irregular.

Mr. Knight and Mr. G. Richards, now moved that the Demurrer might be taken off the File for Irregularity, as it was filed after the Order for the Injunction had been obtained. They said that the Injunction was made until the Defendant *should fully Answer the Bill* and the Court make Order to the contrary: and, therefore, if the Demurrer were allowed on Argument, the Bill would be out of Court, and yet the Injunction would remain in force: that the old Practice with respect to Demurrers, remained unaltered, except that the time for demurring was limited to 12 days after Appearance.

Mr. Jacob and Mr. James Russell, for the Defendant.

The Vice-Chancellor said that, as the Demurrer was filed before the expiration of the 12 days, it had been regularly filed; and that, on the Demurrer being allowed, the Bill would be out of Court, and the Injunction would fall to the ground.

Motion refused, with Costs.

* See 10th of Lord Brougham's Orders.

1837 :
25th July.

Costs.
Next of Kin.

In a Suit for the Distribution of an Intestate's Estate, certain Persons, not Parties to the Suit, proved themselves to be Next of Kin, before the *Master*. Held that they were entitled to be paid the Costs of so doing, out of the Intestate's Estate.

BENNETT v. WOOD.

THE Bill was filed by two of the Next of Kin, against the Administrator of an Intestate, for the purpose of having the Intestate's Estate administered and the Residue distributed amongst the Plaintiffs and the other Next of Kin.

Under the Decree, four Persons not Parties to the Suit, had proved themselves to be Next of Kin before the *Master*, and they now moved to be paid their Costs incurred in so doing.

Mr. *Jacob*, in support of the Motion, said that the Persons on whose behalf the Motion was made, ought, regularly, to be brought before the Court by Supplemental Bill ; in which case, they would have their Costs out of the Intestate's Estate ; and that, as the Plaintiffs would be paid their Costs, the other Next of Kin ought also to be paid their Costs out of the Estate.

Mr. *Barber* and Mr. *Eade*, for the Plaintiffs, said that it was a general rule that either Creditors or Next of Kin going in before the *Master* to establish their Claims, must bear their own Costs. *Waite v. Waite (c)*.

The VICE-CHANCELLOR :

As I understand, it is impossible that the Fund can be distributed without ascertaining who are the Next of Kin of the Intestate ; and, if there is any question who are the Next of Kin, it is a question which the Intestate has raised, and, therefore, his Estate ought to pay the Costs.

Motion granted.

(a) Madd. & Geld. 110.

CASES IN CHANCERY,

BEFORE THE

VICE-CHANCELLOR.

CANNINGS v. FLOWER.*

EL FISHER, by his will, directed his Trustees and possessed of one-sixth part of the monies to from the sale and conversion of his residuary and personal Estate, in Trust for *John Trotman* his life, and, after his decease, in Trust for *Eleanor Trotman*, widow, the daughter of *John Trotman*, for her separate use, and, after the decease of survivor of them, in Trust for the children of *Eleanor Trotman* by her late husband *William Goddard*, in equal shares, absolutely, as Tenants in Common: and the Testator declared that the shares of the sons should vest in them on their attaining 24 or dying at that age leaving issue, and the shares of the daughters, on their attaining 24 or days of marriage, at the shares of such of the children which should become vested in them as aforesaid, should go and accrue to the others of them: but the will contained no gift over in the event of none of the children surviving having a vested interest.

1835:
17th & 18th
November.

Maintenance.

The shares of children in a legacy, were contingent on the sons attaining 24 or dying under that age leaving issue, and on the daughters attaining 24 or marrying; but the legacy was not given over in the event of no child acquiring a vested interest. The Court refused to order Maintenance for the children, unless the Testator's next of kin would consent.

* *Ex Relatione.*

1835.
CANNINGS
v.
FLOWER.

John Trotman died in 1826; and *Eleanor Goddard*, having intermarried with *Thomas Gunning*, died in 1834, leaving three children by her first husband.

Thomas Gunning and the three children of his late wife, (whose interests under the will were still contingent,) presented a Petition of which the principal object was to have the income of their presumptive portions applied for their maintenance.

Mr. *Kindersley* and Mr. *Greene*, in support of the Petition, cited *Greenwell v. Greenwell* (a) and *Collins v. Blackburn* (b) and said that there was no case except the latter, (where the application was granted,) in which the question had arisen between the legatees and the next of kin whose possibility of interest arose *dehors* the will, and must be subject to the satisfaction of every benefit or right that arises upon the construction of the will. In considering, therefore, the question of maintenance out of a legacy given upon a contingency, without any gift over, amongst a class all of whom have an equal chance of taking the fund *absolutely*, the Court will not look to any interest or possibility which does not arise upon or by virtue of the will. The cases of *Ex parte Kebble* (c) and *Turner v. Turner* (d) are cases in which the question arose between the legatees and others interested in the fund under Limitations over contained in the will.

Mr. *Spurrier*, for the Trustees of the will, submitted whether the order could be made in the absence of the parties who would take in the event of none of the

(a) 5 Ves. 194.

(b) 9 Ves. 470.

(c) 11 Ves. 604.

(d) *Ante*, vol. IV. page 430.

Petitioners acquiring a vested interest under the will :
 e said that, in *Ex parte Kebble and Turner v. Turner*, the
 der for maintenance was refused on the ground that
 e bequest was not such that the infants or any of them
 ust of necessity take the whole fund.

1835.
 CANNINGS
 v.
 FLOWER,

Mr. Twells appeared for other parties.

The *Vice-Chancellor* said, he considered that the
 ile was established in the manner stated in his judg-
 ment in *Turner v. Turner* : that the chances of obtaining a
 rested interest in the fund, appeared not to be equal
 as amongst the children themselves ; and that, at all
 events, he could not make the order without the consent
 of the Testator's next of kin.

LAMBERT v. FISHER.

1835 :
 24th October.

UNDER an Order in this cause, certain issues had
 en tried, and verdicts were found for the Plaintiffs. The
 defendants afterwards moved for a new trial of the issues,
 l, thereupon, by an Order of the 15th of August 1833,

Construction
 of Order.
 Costs.

Court referred it to The *Master* to tax the Plaintiffs
 ir costs of the trial of the issues and of that appli-
 ion ; and, upon payment, by the Defendants to the
 Plaintiffs, of the said costs when taxed, it was ordered
 t a new trial should be had at the next Spring
 sizes for the county of *Lancaster*, and that the hear-
 : of the cause for further directions and all further
 eedings should be stayed until after the trial.

Certain Issues
 having been
 tried and Ver-
 dict found for
 the Plaintiffs,
 the Defendants
 moved for a new
 Trial ; upon
 which it was
 ordered that the
 Plaintiffs' Costs
 of the Trial

should be taxed, and that, upon the Defendants paying those Costs,
 a new Trial should be had. Held that the Defendants were not com-
 pellable to pay the Costs under the Order, unless they thought fit to
 proceed to a new Trial.

1835.

LAMBERT
v.
FISHER.

Before the new trial took place, the suit was compromised. One of the terms of the compromise was as follows: "That all parties be entitled to such costs as are awarded to them by the present orders and decrees, and that all other proceedings be stayed, each party paying their own costs." The Plaintiffs afterwards proceeded to tax the costs mentioned in the order of the 15th of August, although the Defendants opposed the taxation, on the ground that the order left it to the option of the Defendants whether they would or would not pay the costs as the price of a new trial, and, therefore, if they did not desire to have a new trial, there was nothing in the order to compel them to pay the costs; and that, independently of the order, the Defendants were exonerated, by the terms of the compromise, from payment of the costs.

The costs having been taxed, the Plaintiffs issued a subpoena against the Defendants, to enforce payment of the amount.

The Defendants now moved that the subpoena might be discharged with costs, and that the Plaintiffs might be restrained from sealing or issuing any attachment or other process for enforcing payment of the costs.

Mr. *Knight*, Mr. *Boteler* and Mr. *Jacob*, for the Defendants.

Mr. *Kindersley* and Mr. *Duckworth*, for the Plaintiffs.

THE VICE-CHANCELLOR:

It appears to me that there is no order, whatever, subsisting for the payment of the taxed costs of the trial.

If it had been the intention of the Counsel who argued the case upon the application for a new trial, that, at all events, the costs of the former trial should be paid, they would have taken care to have had it inserted in the order that the costs of that former trial should be taxed and should be paid on or before a given day, and, upon payment of them, that the new trial should take place. But the order is drawn up in quite a different manner; and, as it stands, in case the parties did not proceed to the trial of the issues by the next Spring term, it would have operated nothing, except that it would have had the effect of postponing the hearing of the cause for further directions and all further proceedings until after the time appointed for the new trial. If the issues had not been tried and the parties had not come to a compromise, the Plaintiffs would have had the cause heard for further directions, and then some order would have been made for payment of the costs of the trial which had taken place.

1835.
LAMBERT
v.
FISHER.

How it happened that the order was not framed in the manner I have alluded to, I cannot tell; but, certainly, there is a most palpable distinction between directing, absolutely and in the first instance, that the costs should be paid, and directing, merely, that the costs should be taxed, and that, upon payment of them, certain Trial should be proceeded with.

Now, that being the state of things, and it being, in my opinion, as plain as possible that there is not, in the order, any direction that the costs should be paid, the Plaintiffs had no right to take out a subpoena for enforcing the payment of them: and therefore I shall direct the subpoena to be discharged. But, with respect to the rest of the motion, I do not think that I ought

1855.

LAMBERT

v.

FISHER.

to make any order: for there appears to have been some misunderstanding as to the true effect of the words of the agreement; and, therefore, I shall leave the parties to act on it as well as they can.

Subpoena discharged without costs: the rest of the motion, refused.*

* Affirmed by The Lord Chancellor, 9th March 1856.

1835:

2d November.

*Practice.**Process.**Contempt.*

PITMAN v. LOCKYER.

THE *Solicitor-General*, on moving that an appearance might be entered for the Defendant under 11 Geo. 4 & 1 Will. 4, Chap. 36, Rule 13, said that he doubted whether the motion was necessary.

Where a Plaintiff wishes to have an Appearance entered for a Defendant

under 11 Geo. 4 & 1 Will. 4, Chap. 36, Rule 13, he must make a Motion for that purpose.

The *Vice-Chancellor* held that the motion was necessary, and made the order.

RIDDELL v. RIDDELL.

BY an Order in this cause, it was referred to The *Master* to inquire and state whether, upon the occasion of the sale of certain freehold and copyhold estates by *John Riddell*, the Testator in the cause, to *Robert Morris*, the former had executed to the latter any and what indemnity or indemnities, either by bond, covenant or otherwise, in respect of the claims of the Defendant, *Rose Riddell*, the Testator's widow, for her dower in the estates aliened and surrendered by him during his lifetime; and in case The *Master* should find that the Testator had executed any such indemnities, then he was to inquire whether such bonds, covenants or indemnities had descended to or become vested in any and what person or persons other than the original purchaser or purchasers from the Testator of the hereditaments in respect of which such indemnities were executed, and whether such indemnities were or not then a subsisting charge or claim capable of being enforced by any and what person or persons against the Testator's estate and effects.

The *Master* reported (amongst other things) that, by an indenture of the 15th of July 1825, the Testator, in consideration of 1,500*l.* paid to him by *Morris*, covenanted to surrender a piece of land into the hands of the Lord of the Manor of *Cheltenham*, to the use of *Morris*, his heirs and assigns; and that he also covenanted

1835:
18th November
and 8th Dec.

*Vendor and
Purchaser.
Covenants.
Copyholds.*

A. sold and covenanted to surrender copyholds to *B.* and covenanted for the title in the usual manner. On the next day the surrender was made. Sometime afterwards *B.* sold and covenanted to surrender the copyholds to *C.* and covenanted for the title as against his own acts only; and *B.* afterwards, surrendered to *C.* Held that the original covenants were capable of being enforced against *A.* for that either they ran with the land, or *C.* was entitled to sue on them in *B.*'s name.

1835.

RIDDELL

v.

RIDDELL.

with *Morris*, his heirs and assigns, that, notwithstanding any act done by him, he had good right &c., to surrender the piece of land, and that *Morris*, his heirs and assigns should peaceably hold and enjoy the same, without any let, suit, &c. by the Testator or his heirs or any person claiming under him or them, and that freely and clearly acquitted, &c. or otherwise by the Testator, his heirs, executors or administrators saved harmless and indemnified from all former and other gifts, grants, jointures, dowers, &c. and from all other estates, rights, troubles, charges, and incumbrances had, made, occasioned or suffered by the Testator or any person claiming or to claim by, from, through or under him. The *Master* further reported that, on the 16th of July 1825, the Testator surrendered the land according to his covenant, and *Morris* was admitted tenant thereof: that, in November following, *Morris* agreed to sell and covenanted to surrender part of the land to one *Billings* in fee, and covenanted for the title, *as against his own acts and the acts of persons claiming under him*, with *Billings*, his heirs and assigns, and, shortly afterwards, *Morris* surrendered the land pursuant to his covenant, and *Billings* was admitted tenant of it; and that, in 1828, *Morris* became bankrupt. The *Master* certified that the covenants contained in the Indenture of the 15th of July 1825, were an indemnity, to *Morris*, his heirs, executors, administrators and assigns against the dower or freebench of the Testator's Widow in respect of the land thereby covenanted to be surrendered, and that such indemnity was a subsisting charge and capable of being enforced by *Billings* against the estate and effects of the testator.

Two Petitions now came on to be heard, one presented by the Defendants, praying that the Report might

be confirmed, and the other, by the Plaintiffs, praying that it might be referred back to The *Master* to review his Report.

1835.

RIDDELL

v.

RIDDELL.

Mr. *Kindersley*, Mr. *Watson* and Mr. *Coulson*, for the Plaintiffs :

The question is whether *Billings*, who claims under *Morris*, is entitled to the benefit of the covenants entered into by *Riddell* with *Morris*, or, in other words, whether those covenants run with the land. Now, in order to make a covenant run with the land, there must be a privity of estate between the covenantor and covenantee at the time of entering into the covenant : *Webb v. Russell* (a). But, at the time when the covenants in question were made, there was no privity of estate between *Riddell* and *Morris*. The covenant to surrender gave *Morris* no interest in the estate at law : he had merely a right of action on the covenant, and, until the surrender was made, he was a stranger to the land. On the next day the land was surrendered to him : but a subsequent surrender cannot make that which was a covenant in gross, a covenant running with the land. Where the same deed conveys the estate and contains the covenants, there is a privity of estate : but where the covenantee has no interest in the estate at the time when the covenants are entered into, there is no privity of estate between him and the covenantor. Besides a surrenderee of copyholds is not in under the surrenderor, but under the Lord ; and the admittance by the Lord is a grant of a new estate. Consequently *Morris* did not take under *Riddell*, nor did he take the same estate as *Riddell* had. *Roach v. Wadham* (b), *Brown's*

(a) 3 T. R. 393.

(b) 6 East, 289.

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RIDDELL

v.

RIDDELL.

Case (c). At Law, a copyholder has only an estate at will, protected by the freehold in the Lord; and though copyholds are descendible by custom, they are not estates of inheritance for a collateral purpose, such as the annexation of a covenant. A copyholder cannot prescribe in his own name, on account of the weakness of his estate; but, if he prescribe for common in the soil of a stranger, he must prescribe in the name of his Lord (d). That he cannot prescribe in a *que estate*, shows that he is not, at law, an assignee of the estate of his predecessor, but is in of an estate derived from custom. So strong was the opinion that copyholds were not estates of inheritance for collateral purposes, that it was not thought, for some time, that a surrenderee of copyholds could have the benefit of the 32d H. 8, Chap. 34. *Brasier v. Beale* (e), *Swinerton v. Miller* (f), *Glover v. Cope* (g). But that Statute does not extend to covenants entered into on conveyances in fee or gifts in tail, but only to cases where the relation of landlord and tenant exists. *Leves v. Ridge* (h), *Isherwood v. Oldknow* (i).

Mr. Jacob, Mr. Hodgson, Mr. Hayter and Mr. Lewis, in support of the Report :

If the covenants entered into by *Riddell*, do not run with the land, still it is quite clear that the original

(c) 4 Rep. 22.

(f) Hob. 177.

(d) Ibid. 31 (b).

(g) 1 Show. 284.

(e) Yelv. 222.

(h) Cro. Eliz. 863.

(i) 3 M. & S. 382. The following Authorities also were cited in the course of the Argument : *The Duke of Bedford v. The Trustees of the British Museum*, 2 M. & K. 552 and 2 Sug. Vend. App. No. 22. 2 Sugd. Vend. 78. Co. Litt. 385 a, and *Flight v. Glossopp*, 2 Bing. N. C. 125.

covenantee or his representatives may enforce them. *Stokes v. Russell* (k). In that case the mortgagor, with whom the covenants were originally entered into, maintained the action which had been brought, unsuccessfully, by *Webb*, the assignee; so that, at all events, the sub-purchasers in this case may enforce *Riddell's* covenants by suing in the name of *Morris*, their vendor. *Morris* is, in fact, a trustee of those covenants for the persons claiming under him: for it must have been taken for granted that they would have the benefit of those covenants; otherwise they would have required *Morris* to enter into general covenants with them, and would not have been satisfied with his covenanting against his own acts and the acts of persons claiming under him.—[The *Vice-Chancellor*: In my opinion, a Court of Equity would compel *Morris* to permit the sub-purchasers to bring actions on the covenants in his name, as he could not, honestly, refuse the permission.]—At this time of day no attention can be paid to the argument that the copyholder comes in under the Lord. The Lord is a mere instrument: the copyholder is in under the surrenderor. The estate remains in the surrenderor until the admittance of the surrenderee, and then it vests in him immediately; so that he takes the same estate as the surrenderor had. In *Glover v. Cope*, there were two questions: first, whether the covenant would run with the reversion of a copyhold, at common law: secondly, whether the assignee of a reversion of a copyhold, was within the 32d H. 8, c. 34: and, according to the Report in *Levinz* (l), (which is the better Report, as we think) the judgment of the Court was given on both points.

1835.

RIDDELL

v.

RIDDELL.

(k) 3 T. R. 678.

(l) 2 vol. 326.

1835.

RIDDELL

v.

RIDDELL.

In the argument for the Plaintiffs, the distinction between the benefit of a covenant and the burden of a covenant, has not been sufficiently attended to. Privy of estate may be necessary in order to make the burden of a covenant run with the land, but it is not necessary in order to make the benefit of the covenant run with the land. *Spencer's Case* (m). The dictum of Lord Kenyon in *Webb v. Russell*, has been misunderstood: it is quite correct if taken with reference to the facts of that case; but, taken as a general proposition, it is not well founded. In order to make covenants run with the land, it is not necessary that the covenantee should have an interest in the land: it is sufficient, if, at the time when the covenants are entered into, it is contemplated that he should have an interest in the land. It is obvious that the transmission of the estate and the making of the covenants, need not be contemporaneous with each other: for covenants contained in a feoffment or in a covenant to levy a fine, will run with the land, although livery of seisin is not made, or the fine is not levied until some time afterwards. By the deed of the 15th of July, *Riddell* covenanted to surrender the copyholds to *Morris*, and entered into the covenants for title; and, on the next day, he made the surrender. These transactions must be looked upon as one assurance. The covenant to surrender, was not a mere personal covenant; it was a real covenant; and the right to enforce it would have descended to the heir, or passed to the assignee of *Morris* (n). As he had a descendible right to call for a surrender, he was not a stranger to

(m) 5 Rep. 16, Co Litt. 385 a.

(n) Vin. Ab. Tit. Covenant (H. I. K.)

the land, but had a sufficient right or interest in it to make the covenants run with the land.

1835.

RIDDELL

v.

RIDDELL.

Mr. *Knight* appeared for *Riddell's* Executors.

The VICE-CHANCELLOR:

Where a deed containing a covenant to surrender copyholds and covenants for title, is executed on one day, and the surrender is made on a subsequent day, the whole, in my opinion, must be taken as one assurance; as is the case where a deed of feoffment is executed on one day, and the livery of seizin is not made until a subsequent day. If that be so, the covenants in question will run with the Land, and the persons who are the owners of the land, can enforce them. But, if they do not run with the land, then they are covenants in gross, and *Morris* must be considered as holding them for the benefit of the parties who claim by assignment under him. For it is evident, from the form of the transaction, that the intention of the parties was that the original covenants should either run with the land, or, if not, that they should remain with *Morris* for the benefit of his assignees.

In my opinion, therefore, the finding of The *Master* is right; for the covenants are capable of being enforced, against *Riddell's* estate, by the purchasers from *Morris*, either in their own names or in the name of their vendor.

1835:
1st Nov.

Legacy Duty.

Testatrix gave to Trustees such a sum of money as that the annual produce thereof when invested in the funds, would produce the clear yearly sum of 500 L. and she declared Trusts of the fund for some of her relatives and other persons, in succession, some of them not being ascertained at her death. Held that the fund was not exempted from legacy duty.

SANDERS v. KIDDELL.

CATHERINE CASTLE bequeathed to the Plaintiffs such a sum of money as that the annual produce thereof when invested would produce the clear yearly sum of 500 L. upon Trust to invest the same, in the names or name of the said trustees or trustee for the time being thereof, in the Parliamentary Stocks or other Public Funds, or at Interest on Government or real Securities, and upon Trust to pay the annual produce of two equal fifth parts of the Trust Premises to the Testatrix's uncle, *Henry Castle*, during his life, and the annual produce of two other equal fifth parts to the Testatrix's aunt, *Roseanna Castle*, during her life, and subject to the Trusts aforesaid, to pay the annual produce of the same four equal fifth parts to *Elizabeth Dunsford*, for her life: and the Testatrix directed that, after the decease of *Elizabeth Dunsford*, the same four equal fifth parts should be in Trust for all the Children of *Elizabeth Dunsford* who, being sons, should attain 21, or, being daughters, should attain that age or marry under it with the consent of their parents or guardians, in equal shares, absolutely, and, if there should be no such child, then that the said Trust Monies should sink into the Testatrix's residuary estate: and upon further Trust to pay the annual produce of the remaining fifth part of the same Trust Premises to *Michael Castle Gascoigne* during his life, and, after his decease to any wife who might survive him, during her life; and, after the decease of the survivor of them, the same remaining fifth part should be upon the like Trusts for the benefit of the Children of *Michael*

Castle Gascoigne, as were therein declared in favour of the Children of *Elizabeth Dunsford*, concerning the four-fifth parts of the same Trust Premises the Trusts whereof were first thereinbefore declared : and, if there should be no child of *Michael Castle Gascoigne* in whom the same remaining fifth part should become absolutely vested, the same should, immediately upon the decease of the survivor of *Michael Castle Gascoigne* and his wife and such failure of his issue as aforesaid, be in Trust for *Ann Kiddell Gascoigne*, sister of *Michael Castle Gascoigne*, absolutely : and the Testatrix bequeathed all the residue of her personal estate to her aunt, *Ann Kiddell*, absolutely.

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The Testatrix left all the persons named in her will her surviving. *Elizabeth Dunsford* had several children. *Michael Castle Gascoigne* was still a bachelor.

The Bill alleged that the persons beneficially interested in the legacy of 500 *l.* a year, insisted that, besides purchasing 16,666 *l.* 13 *s.* 4 *d.* Three per Cents. for satisfying that legacy, the Plaintiffs ought, out of the Testatrix's general personal estate, to pay the legacy duty thereupon so far as the same was then payable, and to reserve a sufficient sum to pay the legacy duty so far as it could not then be paid : but the Plaintiffs were not only unable to determine whether the duty was to be paid out of the legacy itself or out of the general personal estate, but, in case it was to be paid out of the latter, the Plaintiffs did not know what sum they ought to retain to pay the duty on the one-fifth part bequeathed to *M. C. Gascoigne* for life with Remainder over ; because it could not be ascertained, during his life, what duty might ultimately become payable thereon. The Bill prayed that proper directions might

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be given with respect to the legacy duty in case the Court should be of opinion that it ought to be paid out of the Testatrix's general personal estate.

Mr. *Garratt*, for the Plaintiffs.

The *Solicitor-General* and Mr. *Toller*, for the Defendant, Ann *Kiddell*, the residuary legatee, said that the word 'clear,' was not sufficient, of itself, to exempt the legacy from duty; and, moreover, that the legacy could not be free from duty, as some of the parties who were to take in succession, were related in different degrees to the Testatrix, and some of them were not related to her at all, and, therefore, they would have to pay different rates of duty.

Mr. *Jacob*, Mr. *Osborne* and Mr. *Everett*, for the Defendants, the *Cestui que Trusts* of the legacy, cited *Barksdale v. Gilliat* (a), and *Louch v. Peters* (b).

The *Vice-Chancellor* said that it appeared, from the language of the will, that the Testatrix meant that what she had directed to be done, should be done at once: that *Michael Castle Gascoigne* might or might not marry a relation of the Testatrix, and his children might be related, in some degree, to the Testatrix, or they might not; and therefore, the word, 'clear,' must be taken to refer not to the legacy duty, but to the expenses of investment, and so on.

(a) 1 Swanst. 562

(b) 1 Myl. & Keen, 489.

DENT v. BENNETT.

THE Plaintiff was the nephew and executor of *Jonathan Dent*, who died in August 1834. The Defendant had been the medical attendant of the deceased. On the 15th of September 1829, at which time, *Jonathan Dent* was 86 years of age, the following agreement was signed by him and the Defendant: "Memorandum of agreement between *Jonathan Dent* of *Winterton*, in the county of *Lincoln*, and *Lucas Bennett* of *Barton-upon-Humber*, Surgeon and Apothecary.—Whereas the said *Lucas Bennett* does hereby promise and agree that he will, at all times when required, diligently and faithfully give his medical and surgical attendance to his friend, *Jonathan Dent*, for and during the remainder of his life: and the said *Jonathan Dent*, in consideration thereof, and out of gratitude and respect to his friend, *Lucas Bennett*, for past services, for having saved his life when in the greatest danger, does hereby promise and agree that the said *Lucas Bennett* shall have and be fully entitled to the sum of 25,000*l.* of lawful money at his, *Jonathan Dent*'s decease: and the said *Jonathan Dent* does, hereby, further order and direct that the said sum of 25,000*l.* shall be fully and duly paid by his heirs, executors, administrators and assigns, out of his personal estate and effects, six months next after his decease, to his friend, *Lucas Bennett*, his heirs, executors, administrators and assigns, independent of any will or wills the said *Jonathan Dent* has made or may hereafter make

1835:
19th 25th &
30th November
& 1st December.

Agreement.
Fraud.

The principle upon which Courts of Equity relieve against securities taken by an Attorney from his Client, apply to all cases in which confidence is reposed by one party in the other: therefore, the Court will relieve against an agreement taken by a medical adviser from an aged patient, by which the former, in consideration of his past and future services, was to be paid 25,000*l.* after the death of the latter. The Court was also of opinion that the agreement was void at Law: as it

was an inducement to the medical adviser to accelerate his patient's death.

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after the date hereof. In witness whereof we have hereunto set our hands this 15th day of September, in the year of our Lord 1829. *J. Dent—Lucas Bennett—Witness Benjamin Crowder.*" The following indorsement was afterwards made on the agreement, in *Dent's* handwriting: "This agreement is on the back of a letter, by my friend *Lucas Bennett*, at my request and by my direction, which I have signed and approved thereof; which is a *bonâ fide* transaction. *J. Dent.*"

The Defendant having brought an action on the agreement against the Plaintiff, the latter pleaded *Non Assumpsit* and *Per Fraudem*, and filed the Bill in this suit praying for an injunction to restrain the action, and that the agreement might be delivered up to be cancelled, on the ground that it had been obtained from the deceased when he was of an advanced age and without advice, and by the exercise of undue influence on the part of *Bennett* over the deceased, his patient.

The Answer gave the following account of the transaction: That, in November 1827, the Defendant attended the Testator who had been attacked with paralysis, and, by prompt and copious bleeding and other proper means, saved his life; that the Testator, who was a person of great wealth, observed to the Defendant from time to time after his recovery, that the Defendant was entitled to be handsomely remunerated for the services he had rendered the Testator and for his future attendance upon him; and the Testator having again spoken to the Defendant to the same effect on the 14th of September 1829, when the Defendant was at his house, the Defendant said that it would be better that the Testator should enter into some agreement as to the remuneration that the Defendant was to receive;

that the Testator replied that he thought it a very good plan, and suggested that an agreement should be drawn up between him and the Defendant; that the Defendant then asked the Testator for some paper, but he said he had none in the house; and the Defendant, happening to have, in his pocket, a letter that was not much written upon, he, in the presence and by the direction of the Testator, wrote, upon part of it, a rough draft of the agreement, and then handed it to the Testator, who read it over and approved of it and then returned it to the Defendant to fair copy, and the Defendant, accordingly, fair copied it on the other part of the letter, in the Testator's presence, and then delivered it to the Testator, who locked it up in his desk, observing that it would be proper for some person to see him sign it, and that, as he did not want his lawyer or any of his own folks to know any thing about it, he requested the Defendant to bring, the next time he came, some indifferent person to see him sign it; that, on the following day, the Defendant took with him to the Testator's house, one *Benjamin Crowder*, a retired Tailor and Draper; and the Testator then produced and deliberately read the agreement, and signed it in the presence of *Crowder* and the Defendant, and then delivered it to the Defendant; that the Defendant then took *Crowder* to his house, and finding, on his arrival, that he had been sent for by a patient who was extremely ill, appointed *Crowder* to call on him the next morning, which *Crowder* did, and the Defendant then signed the agreement, and *Crowder* attested his signature and also the signature of the Testator: that it afterwards occurred to the Defendant that as the agreement was in the Defendant's handwriting, the Testator's solicitor, from his ill feeling towards the Defendant, would endeavour to raise objections to it, and, therefore, the Defendant, on the 22d of

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September 1829, took the agreement to the Testator and stated to him that, as the same was in the Defendant's handwriting, the Testator's attorney might endeavour to make objections to it, and that it ought to have some memorandum, in the Testator's handwriting, to corroborate it, to which the Testator assented, and thereupon made the before-mentioned indorsement on the agreement.

The Injunction having been obtained, and the Order *Nisi* for dissolving it having been made, the Plaintiff now showed cause.

Mr. *Knight*, Mr. *Bethell* and Mr. *Wright*, for the Plaintiff, contended that the case was not fit to be submitted to a jury, but ought to be determined in a Court of Equity, as there were many circumstances in it which were proper for the consideration of a Court of Equity, and of which a jury would not take cognizance; such as the great age of the Testator, his being without the protection or advice of his solicitor or any of his family or friends, and exposed to the influence of his medical man, who was in the habit of attending upon him from day to day. *Clarkson v. Hanway* (a), *Watt v. Gros* (b), *Bridgman v. Green* (c), *Griffiths v. Robins* (d), *The Duke of Bedford v. The Trustees of the British Museum* (e).

Mr. *Barber*, Mr. *Wigram* and Mr. *G. Richards*, for the Defendant, contended that the action ought to be allowed to proceed, as all the circumstances of the trans-

(a) 2 P. W. 203.

(d) 3 Madd. 191.

(b) 2 Scho. & Lef. 492.

(e) 2 Myl. & Keen, 552.

(c) 2 Vez. 627.

action which could possibly be tried, were put in issue by the pleas which had been pleaded at Law, and this Court could not give relief until those circumstances had been investigated before a jury : *Houlditch v. Nias* (f), *Eyre v. Everett* (g) : that the Cases cited for the Plaintiff contained grounds which were not cognizable in a Court of Law : that, in this case, the Defendant had not taken a gift from his patient, but had taken a security for payment ; and that security, not being under seal, was equally cognizable at Law as in Equity : that the jury would be directed, by the Judge, to find a verdict for the Defendant at law, in case they should think that the remuneration secured by the agreement was extravagant ; and, in short, that there was no case in which a Court of Equity had interfered to prevent the trial of an action, where the instrument might be questioned and all the circumstances connected with the transaction might be gone into at law.

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The VICE CHANCELLOR :

From the time that I first heard this case stated, it appeared to me to be one of very great importance, and it is for that reason that I have anxiously attended to all that counsel could say on the subject before I delivered my opinion. But I must say that, from the beginning, it has struck me with very great surprise that any one who had the power of withdrawing such a case as this from the attention of the public, should have allowed it to be discussed in public. In my opinion, however, as the case now stands, nothing can be more useless than to allow the action to proceed ; for it is plain, on the face of the agreement itself, that it is not worth one farthing

(f) 8 Price, 689. (g) 2 Russ. 381.

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in point of law. Because it is an agreement between a medical adviser and his patient, which contains, first of all, a stipulation that *Bennett* would, at all times when required, diligently and faithfully give his medical and surgical attendance to his friend, *Jonathan Dent*, for and during the remainder of his life. So that it is an agreement which is framed on the foundation of having the medical assistance of the Defendant continued, and not on the ground that the connexion between the two, as patient and medical adviser, is to be dissolved.—*[His Honor then read the remainder of the Agreement.]*—It is plain that the existence of such an agreement, is a direct *premium* to the medical adviser to accelerate that death upon the happening of which he is to have 25,000 *l.* and it is in vain to say that, in fact, it did happen that the party who was to give the 25,000 *l.*, did live four or five years after the agreement. You must look at the agreement as it stood at the time when it was made; and it must be admitted that the human mind is so constituted as that this agreement might be a temptation to some persons to do the very thing which, it is obvious, it was the duty of the party who took the agreement not to do; and my deliberate opinion is that it is totally void, in point of law, for that reason.

But supposing it were not so, and that there were some doubt on the question whether the instrument were totally void at law; then how does the case stand? The person who had been the medical adviser, and who had rendered past services which had made a great impression on the aged patient, thinks it a right and fit thing, when they two were together and without the intervention of any legal adviser, and without any

suggestion from the aged person as to what the quantum of remuneration should be, (except that there was some loose conversation in which Mr. *Dent* once said that 20,000 *l.* might not be too much, or something to that effect) to take from his aged patient, in consideration of his past services (for all which he had been paid) and of such services as he might thereafter render, an agreement to pay 25,000 *l.* at the death of the patient. Now it would be a very meagre thing to say that that sort of policy which has induced this Court to interfere with respect to transactions between clients and their solicitors and attornies, should be restricted merely to those cases; because as much mischief might be produced and as much fraud and dishonesty practised if transactions of this kind were allowed to stand, as ever took place between any principal who placed confidence in his attorney, and the attorney: and it seems to me that, wherever you find the relation of employer and agent existing in situations in which, of necessity, much confidence must be placed by the employer in the agent, then the case arises for watchfulness, on the part of this Court, that that confidence shall not be abused: and I can hardly conceive a more glaring instance of the abuse of confidence, than the taking, by Mr. *Bennett*, in the manner represented in his answer, this sort of agreement from Mr. *Dent*.

Therefore, if the case were now before me for hearing, and if there were no more in it than that which is represented on this answer, I should be exceedingly forgetful of my duty as a Judge in a Court of Equity, if I were to say that the Plaintiff was not entitled to relief, and my view of the case is that, at present, there is nothing to be tried at law; because I am proceeding on the supposition that the signature of Mr. *Dent* to the agree-

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ment, as well as his signature to the memorandum on the back of it, are both genuine ; and, taking it to be so, I ought, at once, to set my face against a transaction which is fraught with all the mischief that this Court can ever set itself to prevent in the case of solicitor and client. And if a case were to arise before me in which (although there is no positive decision on the subject) I should find that a clergyman or any person in the habit of imparting religious instruction, had taken from a person who placed confidence in him, a security similar to that in the present case, I should not require to have quoted to me an exact precedent, but I should be guided by the principle on which the Court acts in cases between client and solicitor.

My opinion, therefore, is that the Injunction ought to be continued.

1835 :
30th Nov.

*Heir.
Pleading.
Parties.*

The Heir of a deceased Debtor is not a necessary party to a suit instituted under 3 & 4 Will. 4. c. 104, which makes real estates assets for the payment of simple contract Debts.

WEEKS v. EVANS.

THIS was a Creditor's suit against the widow of the deceased debtor, (who was also his executrix and the devisee of all his real estates) to have the deceased's personal estate applied in payment of his debts as far as it would extend, and to have the deficiency raised by sale or mortgage of his freehold Estates, under 3 & 4 Will. 4, c. 104, intituled: "An Act to render Freehold and Copyhold Estates Assets for the Payment of simple contract Debts."

The question was whether the heir of the deceased ought to have been made a party to the suit.

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647

Vice-Chancellor said that, as the bill did not pray the will might be established, the heir was not a party to the suit.*

Q. Whether the heir would not have been a party if there had been descended estates.

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STOCKEN v. DAWSON.

CLIENT had taxed his Solicitor's bill under the *Order* for that purpose, and a balance was due from the client. A doubt having been raised as to the mode of proceeding to compel payment of The balance, the following certificate was returned to the *Vice-Chancellor*, by Mr. *Bicknell*, one of the Registrars.

1835:
3d December.

Practice.
Solicitor and
Client.

Course of proceeding to compel payment of a balance found due, on taxation, from a client to his solicitor.

"The solicitor must first demand payment of the money found due from his client; and, if it is refused, then he must apply to the Court for the Four-day Order, which will be granted on producing an affidavit of the demand and refusal and of the service of the notice of motion. The Four-day Order is then served upon the client and demand again made, and, upon refusal, an order for commitment is granted, without notice, without an affidavit of service of the Four-day Order and if the demand and refusal is produced to the Registrar."

Mr. *Knight* and Mr. *Jacob* were Counsel for the Parties. The doubt was whether it was not necessary for the solicitor, before he applied for the Four-day Order, to obtain an Order fixing a day for payment of the balance.

1835:
10th and 11th
December.

Lease.

—
A Lease of
houses in Lon-
don for 31 years
from the date,
granted by a
Vicar during the
existence of a
lease for 40
years, but which
had less than
three years to
run, is valid.

VIVIAN v. BLOMBERG.

THE question in this cause, was whether a lease, by a vicar, of houses in *London*, for 21 years from the date (not comprising the vicarage house, and the ground demised being less than 10 acres) granted whilst a former lease of the premises for 40 years was in existence, but which had less than three years to run, was void under any of the restraining Acts passed in the reign of Queen *Elizabeth*.

The *Vice-Chancellor* directed a case to be stated for the opinion of the Court of Common Pleas upon the question.

The case having been argued, the Judges of the Court of Common Pleas certified that the lease was valid and binding on the successor of the grantor (a).

On the 20th of December 1836, the cause was heard for further directions, and the certificate was confirmed.

Mr. *Knight*, Mr. *Kindersley*, Mr. *Wigram*, Mr. *Girdlestone*, jun. and Mr. *Campbell*, were counsel in the cause.

(a) See 3 Bing. N. C. 311.

BRINE v. FERRIER.

ANDREW GRAM, Esq. by his will duly executed and attested, dated the 20th May 1802, gave all and singular his messuages, lands, tenements, hereditaments and real estate whatsoever and wheresoever, and also all and singular his leasehold estate and personal estate whatsoever, unto his wife, *Eleanor*, her heirs, executors, administrators and assigns respectively, according to the several natures of the said estates, to and for her and their own proper use and benefit absolutely; and he appointed her sole executrix of his will. Some time afterwards, the Testator wrote, upon three sheets of paper, the following instruments, which were neither dated nor attested:

“Memorandum of will intended to be made by *A. G.*, and, if he dies ere it can be completed, he relies on his faithful wife to have it instantly executed by *Mr. Thomas Pearse*. My body I wish to be interred at *Walmer* without expensive parade, provided I die there, if in *London*, it is immaterial where I am buried. All my lands, tenements, messuages and property of what kind or nature soever, lying at *Walmer* or else-

legacies and annuities, and directed that, after the death and failure of issue of one of the annuitants, the annuity should be paid to his residuary legatee, but he did not name any. In another Testamentary Paper the Testator gave legacies and annuities to the legatees and annuitants named in the former paper, and also to other persons. Held that the three papers formed, together, the Testator's will: that the bequest to the wife in the first paper, was not revoked except so far as was necessary to provide for the legacies and annuities: and that the legacies given by the second and third papers, were single and not cumulative

1835:
15th Dec.

Will.
Construction.
Revocation.
Cumulative
Legacies.

Testator, by his will, gave all his property to his wife, absolutely. By a subsequent incomplete Testamentary Paper, he gave all his property to his wife and two other persons, in Trust to sell and pay the interest of the proceeds to his wife for her life, and, after her decease, to dispose of the principal to the purposes after mentioned. The Testator then gave several

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where, and all my funded property in the different Stocks in the Bank of *England*, and all my other property and effects of what kind and nature soever and wheresoever, I leave to my dearest wife, *Eleanor*, *David Bristow Baker*, and *Thomas Pearse*, in trust to sell, transfer over, or dispose of, and the proceeds of such sale and transfer to be invested in the Funds, and the interest or dividends of all such stocks to be paid to my said dear wife, *Eleanor*, during her life, and, after her decease, to pay and apply the principal money and interest to the several purposes hereinafter mentioned: To *Sarah Thomas*, my wife's sister, I give an annuity of 150 *l.*, payable half-yearly: My valuable friend, Mrs. *Hynam*, I give 250 *l.*, fully assured that she will accept this merely as a token of the very great gratitude and esteem I feel towards her: To *Charles Shrimpton*, my late book-keeper, I give* 300 *l.*: To *Peter Alsing*, my clerk, also 300 *l.*: To Mrs. *Bergeth Maria Carstenson* of *Drontheim* in *Norway*, I give an annuity for life of 100 *l.*: The like to my sister, *Elizabeth Ratcliff* of 150 *l.*: Also to my niece, *Sophia Thode* 50 *l.*: To my adopted child, *Gramina*, I give an annuity of 300 *l.*, and, at her decease, to her lawful children; in defect of issue to be paid to my residuary legatees: To my god-children as they become of age, I leave as follows, or on the day of marriage: *Emma Potts* 500 *l.*: *Eleanor Hage* 500 *l.*: *Charles G. Dunning* 500 *l.*: *Charles Whiting*, 500 *l.*†

“*Elizabeth Ratcliff* of *Drontheim* aforesaid 150 *l.* for her life: To my adopted child, *Gramina Juliana Petronia Clauson*, I leave an annuity of 300 *l.*, and, at her decease, to her lawful children: in defect of issue,

* The first Sheet ended here.

† The second Sheet ended here.

the principal and interest to be paid to my residuary legatees: To my god-children, as they become of age, *Eleanor Hage*, daughter of *J. F. Hage*, Esq. of *Copash*, I leave 500 l.: *Emma Potts*, daughter of *James Potts*, Esq. of *Hackney*, 500 l.: *Charles Gram Dunning*, son of *Charles Dunning*, surgeon of *Wapping Wall*, 500 l.: *Charles Whiting*, son of *John Whiting*, Esq. of *Ratcliff Cross*, 500 l.: To my present servants, *Pagets*, *Wright*, *Daniel*, *Fanny*, *Kemp*, *Mary* and *Maria*, I give each of them 100 l., provided they remain in my service at my decease: To my other servant or servants who shall have lived in my service one year and upwards at my decease, 10 l. each: To my dearest *Maria Sophia Hage*, wife of *J. F. Hage*, Esq. of *Copenhagen*, I leave 150 l. for life in Trust as aforesaid, for her sole use, without being liable to her husband's debts or subject to his control: To each of my above-named trustees and executors I leave the sum of 500 l."

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The Testator died in April 1806: and probate of the will and testamentary papers, *as containing, together, the Testator's will*, was granted to his widow.* She

* *Mr. Williams*, alluding to cases in which a Testator leaves a finished will and a subsequent, unfinished testamentary paper, says: "In these cases it may be observed that the unfinished instrument is not looked upon, in The Ecclesiastical Court, as a codicil to be taken in addition to the will, but revocative as far as it goes, and to be taken in conjunction with the will. 'If this principle,' said Sir *John Nicholl* in *Ingram v. Strong*, 'was rightly understood in other courts, there would seldom be much question about cumulative legacies; for, where a paper is codicillary and two legacies are given to the same person, they are cumulative: where Instructions are pronounced for as containing together a will, that is, where there is a complete will and

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died in 1829. The Plaintiffs and some of the Defendants were interested in her personal estate, under her will.

The questions in the cause were, first, to what extent the Testator's will was revoked by his subsequent testamentary papers: Secondly, whether the legacies given by those papers were single or cumulative legacies.

Mr. Knight, Mr. Jacob, Mr. Wigram, Mr. James Russell and Mr. Paynter for the Plaintiffs and the Defendants in the same interest :

The testamentary papers are merely unfinished instructions for a future will ; and, if *Mrs. Gram* had been alive to her rights, she might have confined the probate to the complete will. It is clear that, if there had been a contest, the papers would not have been admitted to probate. By the language of the probate (which recognises *Mrs. Gram* as sole Executrix) it appears that the Instruments which have been proved, are not considered as a will and codicils, but as constituting, altogether, the Testator's will. In order to make a revocation, there must be not only an intention to revoke, but also an express and positive revocation: and even an express revocation, if it be made with a view to a particular object, will not avail, if that object cannot be effected. If the Testator in this case, had formed any purpose to alter the disposition of the residue, that purpose is not carried into effect. The consequence is that the disposition made by the will,

an instrument intended as the inception of a new will but not completed, the latter legacy supersedes and revokes the former and is substituted in the place of it.' " See 1 Williams on Executors, 83.

remains unaltered, except that the Legacies are to be provided for. *The Case of the Co-heirs of Sir W. Rider* (a), *Coward v. Marshal* (b), *Onions v. Tyrer* (c), *Harwood v. Goodright* (d), *Thomas v. Evans* (e), *Griffiths v. Grieve* (f), *Carstairs v. Pottle* (g), *Harley v. Bagshaw* (h), *Ingram v. Strong* (i), *Ex parte The Earl of Ilchester* (k), *Winsor v. Pratt* (l), *Kirke v. Kirke* (m).

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Mr. Kindersley, Mr. Keene and Mr. Monteith for the Defendants the Next of Kin of the Testator:

The question which the Court has to decide, is not whether there is a complete revocation of a prior instrument, but whether there is not a subsequent instrument, which disposes of the Testator's property differently from what it was disposed of by a former instrument. By the first instrument, the Testator gives the whole of his property, *in specie*, to his wife; by the second, he gives it to his wife and two other persons; but they are not to hold it *in specie*, as the wife would have held it, but are to convert it into money; and then he gives, to his wife, a life-interest and not an absolute interest; and a life-interest, not in the property *in specie*, but in the money to arise from the conversion of his property. The *bequest* in the first instrument is, therefore, revoked.

The Testator next expresses an intention to dispose of the money to arise from the conversion of his property; and he does actually dispose of part of it in

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| (a) Moor, 874. | (g) 2 Phillim. 35. |
| (b) Cro. Eliz. 721. | (h) Ibid. 51. |
| (c) 1 P. W. 345. | (i) Ibid. 312. |
| (d) 1 Cowp. 91. | (k) 7 Ves. 372 & 379. |
| (e) 2 East, 488. | (l) 2 Brod. & Bing. 655. |
| (f) 1 Jac. & Walk. 31. | (m) 4 Russ. 452. |

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legacies and annuities; and then he speaks of persons whom he intended to make his residuary legatees. It is impossible to revert to the disposition made by the will, as the whole of the property is given, by the subsequent instruments, to different persons and for different purposes: and as the Testator has not named the persons who are to take the residue of the money to arise from the conversion of his property, his next of kin are entitled to it. *Jackson v. Jackson* (n), *Hemming v. Gurrey* (o), *Hyde v. Hyde* (p), *Coke v. Bullock* (q).

The VICE CHANCELLOR:

As all these papers have been proved as one instrument, they must all be construed together.

The rule of law is that a prior part of a will, may be revoked by a subsequent part of it. In this case, the Testator, in the prior part of his will, has given the whole legal and beneficial interest in his property, to his wife: and, in a subsequent part of it, he disposes of the whole legal interest to his wife and two other persons; but he does not dispose of the whole beneficial interest. The consequence is that what is not given away from the wife, remains to her.

With respect to the other question in the cause, the Ecclesiastical Court has considered all the papers as forming but one testamentary instrument; and, therefore, the legacies are not cumulative but single.

(n) 2 Cox, 35.

(p) 1 Eq. Ab. 409.

(o) 1 Bligh, N. S. 479 &

(q) Ibid. 410.

2 Sim. & Stu. 311.

LUMSDEN v. FRASER.

1835 :
17th December.

Demurrer.
Pleading.
Parties.

THE Plaintiffs were some of the next of kin of the late *John Farquhar*, Esq. The Defendants were the rest of his next of kin, (some of whom claimed to be his co-heirs also,) and his personal representative. The bill stated that Mr. *Farquhar*, in his lifetime, entered into various contracts for the sale of parts of his real estates, which remained uncompleted at his death : that he died in July 1826, intestate and unmarried, leaving the Defendants, *John Farquhar Fraser*, *James Mortimer*, *Elizabeth Willoughby Trezevant*, and Lady *Pole*, and *George Mortimer* since deceased, and the Plaintiffs *Mary Lumsden* and *Charlotte Aitken*, his only next of kin, him surviving, and the Defendants, *John Farquhar Fraser*, *John Mortimer* and *Elizabeth Willoughby Trezevant*, or some or one of them, his co-heirs or heir at law : that, by an indenture dated the 14th of December 1826 and made between *J. F. Fraser* and *James Mortimer* of the one part, and Sir *William* and Lady *Pole*, *George Mortimer*, *James Lumsden*, and *Mary* his wife and *William Aitken* and *Charlotte* his wife, of the other part, after reciting that *John F. Fraser* and *James Mortimer* claimed to be the co-heirs of *J. Farquhar*, but that their claim was opposed by *Elizabeth Willoughby Trezevant*, who claimed to be his sole heiress at law ; that no letters of administration to the Intestate had

Some of the next of kin of an Intestate filed a bill against the other next of kin, one of whom also was the administrator and claimed to be the heir of the Intestate, alleging that the Intestate, had entered into contracts for the sale of parts of his estates, which were still incomplete, and that the heir and administrator had agreed with the other next of kin, that, whether the contracts should or should not be completed, the estates should be con-

sidered as personalty ; and praying for an account of the rents received by the heir and administrator (who was in possession) and for a receiver. A demurrer, by the heir and administrator, because the purchasers were not parties, was allowed.

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been granted, and differences had arisen, between the next of kin, as to the person to whom such letters should be granted; and that it had been considered that the next of kin of the Intestate would be entitled to the purchase-monies for the estates contracted to be sold by the Intestate, as part of his personal estate; but it had been suggested that, in case the titles to the said estates should not be approved of by the purchasers, or the contracts for sale, on any other account, should not be carried into effect, *J. F. Fraser* and *James Mortimer*, as the co-heirs of the Intestate, might become entitled to the estates the contracts for sale of which might so fail to be carried into effect, to the exclusion of the rest of the next of kin; and that, to prevent any farther delay in procuring letters of administration, as well as to prevent all disputes that might thereafter arise between the parties in respect of the estates contracted to be sold, the parties had agreed that such letters of administration should be immediately taken out by *J. F. Fraser*, in consideration that he and *James Mortimer*, as co-heirs at law, should relinquish all claim, as such co-heirs, to the estates contracted to be sold and the monies to arise therefrom: it was witnessed that *J. F. Fraser* and *James Mortimer* agreed, with the other parties to the deed, that the monies to be received from the purchasers, under the contracts entered into by the Intestate, should, notwithstanding any claim by *J. F. Fraser* and *James Mortimer* as co-heirs of the Intestate, be considered as personal estate of the Intestate, and be divided amongst his next of kin; and that, in case any of the purchasers should, on account of defective title or on any other account, refuse to complete their purchases, by reason whereof the estates might revert to *J. F. Fraser* and *James Mortimer* as the co-heirs of the Intestate, then

they would be trustees of those estates for themselves and for Lady *Pole*, *George Mortimer*, *Mary Lumsden* and *Charlotte Aitken*; and, in case *Peter Trezevant* and *Elizabeth Willoughby* his wife, as or as claiming to be the heiress at law of the Intestate, and as one of his next of kin, should assent to the arrangement thereby made, then also for *E. W. Trezevant*; and that, as soon as any of the estates should, by reason of the contracts being rescinded or abandoned, revert to *J. F. Fraser* and *James Mortimer*, the same should be sold, and the purchase-monies, as well as the rents and profits in the meantime, should, in case *Trezevant* and wife should assent to the arrangement thereby made and execute all such deeds and assurances as should be necessary for confirming the same within six months next after the date thereof, be divided equally amongst the seven next of kin of the Intestate; but, if *Trezevant* and wife should not assent to the arrangement, then that three-sevenths of the purchase-monies and rents should be equally divided between *Fraser* and *James Mortimer*, and the remaining four-sevenths, between Lady *Pole*, *George Mortimer*, *Mary Lumsden* and *Charlotte Aitken*.

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The bill further stated that, in pursuance of the agreement contained in the deed, *Fraser* procured letters of administration to the Intestate to be granted to him: that, in July 1829, *Trezevant* and wife filed a bill, against the other next of kin, for an account and administration of the Intestate's estate: that, by the decree, it was referred to The *Master* to inquire and state whether any of the contracts of the Intestate, for sale of his estates, were subsisting and capable of being or ought to be carried into effect: that The *Master* found that, in November and December 1825 and in January and February 1826, the Intestate entered into contracts

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in writing (all of which were subsisting and capable of being and ought to be carried into effect) with *N. Fletcher, J. Benett, Earl Grosvenor* and other persons, for the sale of parts of his estates; that *Fletcher* was to be entitled to the rents of the hereditaments comprised in his contract, on the 25th of March 1826; that *Benett* was to be let into possession or receipt of the rents of the hereditaments comprised in his contract on the 11th of October 1826, and, if the conveyance should not be executed and the purchase-money paid on that day, he was, thenceforth, to pay interest on it; that *Earl Grosvenor* was to pay part of his purchase-money at Lady-day 1826 and the remainder at Michaelmas following, when the purchase was to be completed, and the rents of part of the property were to belong to him from the date of his contract, and the rents of the remainder from the 29th of September 1826.

The bill then stated that *George Mortimer* died in December 1832, and that the Plaintiff, *Ann Mortimer*, was his personal representative: that in 1833 *Trezevant* and wife filed a bill of revivor and supplement against *Ann Mortimer* and the Trustees of a settlement made by one of the next of kin, and that the original suit was revived and ordered to be prosecuted: that some of the purchasers had been let into possession of the estates comprised in their contracts; but *Fraser* had been, ever since the Intestate's death, and still was in the possession or receipt of the rents of the estates agreed to be sold to *Fletcher, Benett* and *Earl Grosvenor*, and had received sums amounting to 20,000*l.* and upwards in respect of the rents thereof and of timber and underwood which he had cut thereon, and had applied those sums to his own use, and refused to account for and secure the same for the benefit of

the Plaintiffs and the other persons interested therein: that, upon the settling of interrogatories for the examination of *Fraser* in *Trezevant v. Fraser*, the *Master* had been applied to by the Plaintiffs, but had refused to extend the interrogatories for the purpose of taking the account of the sums received by *Fraser*: that, as the Plaintiffs had been advised, the purchasers of the last-mentioned estates might not be compellable to take to the rents thereof, and pay interest on their purchase-monies from the times appointed for the completion of their contracts: that *Fraser* had intimated an intention to repudiate the deed of the 14th of December 1826 in case any of those contracts should not be completed, and had endeavoured to procure some of them to be abandoned or set aside.

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The bill prayed for an account of *Fraser's* receipts and payments on account of the estates sold to *Fletcher*, *Benett*, and Earl *Grosvenor*, and that the balance might be invested and secured for the benefit of the Plaintiffs and the other persons interested therein; and that *Fraser* might be restrained from receiving the rents and timber-monies which might be still unreceived, and that a receiver might be appointed thereof.

Fraser demurred for want of equity, and because *Fletcher*, *Benett* and Earl *Grosvenor* were not made parties to the bill.

Mr. *Jacob* and Mr. *Daniell*, in support of the demurrer, said that, but for the deed of December 1826, the Plaintiffs never could have had any interest in the subject-matter of the suit: that none of the events, on the happening of which the Plaintiffs' rights were to

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accrue, had happened ; and, therefore, it would be premature in the Court to interfere : that the rents of the estates belonged to the purchasers, who would have a right to call on *Fraser* to account for them, and would not be bound by any investment of them that he might have made ; and, therefore, the purchasers ought to have been made parties to the suit ; as the Court would never subject an accounting party to the liability of being called upon to account twice for the same matter : that the Court would not appoint a receiver in this case, for neither fraud nor danger to the property was alleged, nor were the purchasers, who were the owners of the estates in equity, parties to the suit.

[The *Vice-Chancellor* : I confess that I do not see how the objection for want of parties can be got over.]

Mr. *Knight*, Mr. *Walker* and Mr. *Baily*, in support of the bill :

If the purchasers are necessary parties, three separate bills must be filed ; for, if they are all made parties to one bill, they may demur for multifariousness.

The reason assigned for requiring the purchasers to be parties, is that a party is not to account twice over for the same subject-matter. It is true that a party ought not to account twice in the same character ; but when he fills two characters, he is subject to two liabilities and is liable to account twice. If the mortgagee of a term dies, and his executor enters into possession, the executor is liable to account to the next of kin or residuary legatee of the mortgagee

and also to the mortgagor. So here *Fraser* is liable, as representing the vendor, to account to the purchasers, and he is liable to account to the Plaintiffs in a different character. As he fills two different characters, he is subject to two separate liabilities.

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The VICE-CHANCELLOR:

I still think that the purchasers ought to have been made parties.

I am perfectly well aware that if a bill is framed so as to embrace three contracts, entered into by three distinct purchasers, it would be multifarious. But that I consider to be an answer in terms merely, and not in substance: because the real question is whether a separate bill ought not to have been filed against each purchaser, and Mr. *John Farquhar Fraser*: and my opinion is that that is the course that ought to have been taken.

The persons who are Plaintiffs, and who are some of the next of kin, have, by reason of the deed of 1826, acquired an interest in the estates totally distinct from that which they would have had, provided no such deed had been ever made. If they had not procured that deed to be made, they would have stood in the situation, merely, of next of kin, and would have had the benefit of the contracts if they were completed; but if, for any reason depending on title or any other circumstance, the contracts had ceased to have any operation, the Plaintiffs never would have had any interest at all in the estates: for, as I observed before, it was by becoming parties to the deed of 1826, that they acquired an interest which they would not otherwise have had.

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The Plaintiffs allege that, by virtue of that deed and in their character as next of kin, they have an interest in the estates, whether the contracts are completed or not. That is true. And then they represent that Mr. *John Farquhar Fraser* (who is, or claims to be one of the co-heirs at law) is dealing in a particular manner with each of the estates which are the subjects of the contracts; and (among other things) they represent that he is cutting down timber, and that he is receiving the rents and profits; and then they pray that he may account for those rents and profits and for the monies produced by the sale of the timber. Now it appears to me that as, by means of the deed of 1836, they have acquired a new interest in the estates which are the subjects of the contracts, they are placed in such a situation as entitles them to have the accounts taken of the rents and profits and of the timber-money: but my opinion is that they cannot have the accounts which they ask, unless they file three separate bills, and make one of the purchasers, together with Mr. *Fraser*, a party to each of them.

I observe, moreover, that this bill asks that a receiver may be appointed. But, taking it for granted that the Plaintiffs are entitled to what they ask, can they, in the absence of the purchasers of the estates, ask to have a receiver put on the property? I never heard of a case in which a receiver was asked for, as against a person who had an interest in the estate, unless it was suggested that that person refused to take possession, and I do not find any such suggestion here. The consequence of appointing a receiver, would be that he would have to set, let, and manage the estates, so that he would be interfering with the purchasers'

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estates, they being no parties to the order under which he was appointed.

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I cannot but think that this bill is erroneously constructed, and that the proper course would have been to have filed a bill against each of the purchasers, with respect to whom it is represented that there has been this misconduct on the part of Mr. *Fraser*, and to have prayed that he might be restrained from doing those acts the effect of which may be to give the purchaser a right to say that he ought not to be compelled to complete his contract.

I think, therefore, on the ground of those persons not being parties who are interested in the estates as well as in the subject of the accounts, that the demurrer for want of parties ought to be allowed. I shall, however, give the Plaintiffs leave to amend; for though this bill cannot be amended so as to be a good bill against all the three purchasers, it may be amended so as to be a good bill against one of them.*

* Affirmed by The Lord Chancellor, 1 Myl. & Craig, 589.

CAMPBELL v. MACKAY.

1835 :
22d and 23d
December.

1836 :
5th January.

Pleading.
Multifarious-
ness.

By a marriage settlement, the husband settled a fund on the wife, for life, and, after her death, on the children of the marriage; and it was provided that the persons to be appointed their guardians should, together with *A.* and *B.* the trustees of the settlement, have power to apply, after the death of the surviving parent, the interest of the

children's presumptive portions, for their maintenance. After the marriage, the husband vested another fund in *C.* and *D.*, on similar Trusts, and with a like proviso: and, by his will, he bequeathed other funds to *A. B.* and *C.* in Trust for his children with a proviso for their maintenance, and appointed them his executors and, jointly with his wife, the guardians of his children.

A bill was filed by the widow and children (who were infants) against *A. B. C.* and *D.* to have the trusts of the two deeds and of the will carried into execution. *A. B.* and *C.* demurred for multifariousness. The demurrer was over-ruled.

BY an indenture dated in March 1817, being the settlement on the marriage of Sir *James Campbell*, deceased, with Lady *Dorothea Louisa Campbell*, two sums were assigned to *Denis Browne* and *Thomas Herbert* (both deceased,) and *John Mackay* and *Charles Campbell*, upon Trust, after the decease of Sir *James*, to pay an annuity of 800 *L.* to Lady *Dorothea* for her life, by way of jointure, and to pay and apply the rest of the dividends and interest of the Trust-moneys during her life, to and for the use and benefit of the children of the marriage, and, after the decease of Lady *Dorothea*, in Trust, as to the principal, for all the children of the marriage who, being sons, should attain 21, or, being daughters, should attain that age or marry; and, if there should be no such child then in Trust for Lady *Dorothea*: and Sir *James* was empowered, in case there should be issue of the marriage living at his decease, by any instrument in writing under his hand and seal, attested by two witnesses, or by his will attested in like manner, to appoint a person or persons as guardian or guardians of the persons and fortunes of such child or children;

and it was provided that the person or persons so to be appointed, together with *Browne, Herbert, Mackay, and C. Campbell*, or the survivor of them, or the executors or administrators of such survivor, should have power, after the decease of Sir *James* and Lady *Dorothea*, to apply the interest of each child's presumptive portion for his or her maintenance, and a part of the principal of each male child's portion for his advancement, during minority.

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By another deed, dated the 22d of July 1834, Sir *James* assigned the sum of 10,000 *l.* to The Marquis of *Sligo* and *John Home Home*, in trust for Lady *Dorothea* for life, and, after her death, for the children of the marriage, in such shares as Lady *Dorothea* should appoint, and, in default of appointment, in trust for the children equally; and Lord *Sligo* and *Home* were authorized and directed, *in conjunction with the guardians to be appointed for the children of the marriage*, to apply the interest of the 10,000 *l.*, after Lady *Dorothea's* decease, for the maintenance and education of the children during their minorities, in the same manner as the trustees of the marriage settlement were authorized to do with respect to the dividends and interest of the Trust-funds therein comprised.

Sir *James Campbell*, by his will dated the 26th of July 1834, and attested by two witnesses, after giving certain articles to Lady *Dorothea* absolutely, and certain other articles to her for her life, bequeathed 5,000 *l.* to *C. Campbell, Mackay and Home*, in trust to apply the whole or such part of the interest thereof as they should think fit, for the maintenance and education of his three daughters, *Louisa, Charlotte and Emily*, during their minorities, and when they should

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attain 21 or marry under that age with the consent of their guardians thereafter appointed, to pay 5,000 *l.* to each of them; and in case they should all die under 21 or marry without such consent, then the 15,000 *l.* was to sink into the residue of the Testator's estate: and he gave the residue of his estate to *C. Campbell, Mackay and Home*, in Trust to apply a competent part of the interest, at their discretion, for the maintenance and education of his son, *James Campbell*, during his minority, and, when he should attain 21, to pay to him a moiety of the interest until he should attain 25, and then to transfer the capital to him absolutely; but in case he should attain 21 and die before he attained 25, without having any child, then the testator directed that the Trustees should stand possessed of the capital of the residue in Trust for his three daughters on their attaining 21 or marrying under that age with such consent as aforesaid; and, in case they should die under 21 and without having been married, then the Testator directed the Trustees to pay the capital to his brother, *C. Campbell*, absolutely: and he appointed *C. Campbell, Mackay and Home*, his executors, and, together with *Lady Dorothea*, the guardians of his children.

In May 1835 the Testator died at *Paris*, and the Defendants *Campbell* and *Mackay* proved his will. The Testator left *Lady Dorothea*, his widow, and his son and daughters named in his will (all of whom were infants) his only issue him surviving.

The bill was filed by the widow and children, against *Mackay, C. Campbell, Home*, and the Marquis of *Sligo* (who was out of the jurisdiction): and, after stating as above, it alleged, amongst other things, that

Mackay, C. Campbell, and Home had refused to come to an account in respect of the matters in the bill, or duly to administer the Trusts reposed in them, or to concur with Lady *Dorothea* in doing all necessary acts for securing the fortunes of the infants and providing for their maintenance and education: and it prayed that the Trusts of the settlement and of the deed of July 1834 and of the will, might be carried into execution, and, if necessary, that new Trustees might be appointed in the place of *Browne, Herbert, and The Marquis of Sligo*; and that an account might be taken of the Testator's personal estate possessed by the Defendants, and of his debts and funeral and testamentary expenses and legacies, and that his personal estate might be applied in payment thereof, and that the residue might be ascertained and secured, and that an inventory might be taken of the articles bequeathed to Lady *Dorothea* for life, and might be duly signed by her and deposited in The Master's Office; and that the Plaintiffs might be declared to be entitled to 50,000 francs *French Rentes*, which the Defendants claimed as belonging to the Testator's estate, but which the bill alleged to have been bought, by Lady *Dorothea*, out of a sum of money which the Testator, during his absence in *England*, had remitted to her for the maintenance of herself and children; and that proper allowances might be made, to Lady *Dorothea*, for the past and future maintenance and education of the infants; and that a receiver might be appointed of the Testator's outstanding estate.

The Defendants *Campbell, Mackay* and *Home* demurred to the bill because it was filed for and contained distinct matters which were in no manner connected

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with each other, and ought not to be joined together in the same bill.

Sir *William Horne*, Mr. *Wigram*, and Mr. *James Russell*, in support of the demurrer :

The bill states three instruments under which the infants claim beneficial interests. Those instruments are distinct and relate to distinct properties, and in no two of them, are the trustees the same. *Horne* and Lord *Sligo* are not parties to the first deed; *Campbell* and *Mackay* are not parties to the second; and Lord *Sligo* is neither an executor nor a trustee under the will. He, at all events, has a right to object to the suit as being multifarious; for he ought not to be involved in the accounts and inquiries which may be necessary for the administration of Sir *James Campbell's* estate: and, if he may object to the suit going on, so may we also. *Saxton v. Davis* (a). *The Attorney-General v. The Goldsmiths' Company* (b), *Dunn v. Dunn* (c), *Maud v. Acklom* (d).

Mr. *Knight* and Mr. *Parry*, in support of the bill.

By the marriage settlement, Sir *James Campbell* was empowered, by any instrument under his hand and seal or by his will, to appoint guardians of the persons and fortunes of his children; and, after the decease of Sir *James* and Lady *Dorothea*, the guardians, in conjunction with the Trustees, were empowered to apply the interest of the children's portions for their maintenance and support, and also to apply any sum,

(a) 18 Ves. 72.

(c) *Antc*, vol. 2, p. 329.

(b) *Ante*, vol. 5, p. 670. See 675.

(d) *Ibid*. 331.

out of the portions of the male children, for their advancement during their minorities, and such sum was not to be refunded notwithstanding the child so advanced might die under 21. So that the guardians are associated with the Trustees, and, when they are appointed, they become Co-trustees with the original Trustees of the settlement. With respect to the second deed, the bill alleges that Lord *Sligo* and *Home* were thereby authorized and directed, in conjunction with the guardians to be appointed for the infant Plaintiffs, to apply the dividends and interest of the said Trust-fund or sum of 10,000 *l.*, after the decease of Lady *Dorothea Campbell*, for the maintenance and education of the infant Plaintiffs during their minorities, in the same manner as the Trustees under the marriage settlement were authorized and directed to do with respect to the dividends and interest of the Trust-funds or portions thereby provided for the children of the marriage. So that this second deed refers to and is connected with the first, and associates the trustees under it with the persons to be appointed the guardians of the children. The Trustees of the will are then appointed the guardians of the children; and thereby, they become Trustees of the deeds: indeed each of them was, originally, a Trustee of one or other of the deeds. How is the Court to give directions as to the maintenance to be allowed to the infants (which is one of the principal objects of the suit) without having regard to all the funds which are liable to contribute to the maintenance? If there are to be three suits, the Court will not be able to exercise its jurisdiction over the united fund. *Foljambe v. Willoughby* (c).

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It was said that, at all events, Lord *Stigo* might have demurred to the bill. But that is not so: for if, as in this case, there is a common interest in the Plaintiffs, extending over the whole subject-matter of the suit, it is immaterial that there is one Defendant who is not interested in the whole. *Kaye v. Moore* (f), *Turner v. Robinson* (g).

The VICE-CHANCELLOR:

1836:
 5th January.

In this case the bill is filed by Lady *Dorothea Campbell* and her children; and it represents that Sir *James Campbell* transferred two sums into the names of the Defendants, *John Mackay* and *Charles Campbell* and of two other persons, upon Trusts which were declared by an indenture of March 1817; and those Trusts were, out of both the funds, to pay an annuity of 800*l.* to Lady *Dorothea* during her life, and, subject thereto, the funds were to be in Trust for all the children of Sir *James* and Lady *Dorothea*: and it was agreed that, in case there should be issue of the marriage living at the death of Sir *James*, it should be lawful for Sir *James*, by any instrument in writing under his hand and seal or by his will duly attested, to appoint a person or persons as guardian or guardians of the children; and that such person or persons so to be appointed, together with the Defendants *Mackay* and *Charles Campbell*, should have power, after the decease of Sir *James* and Lady *Dorothea*, to apply, towards the maintenance of such children, any annual sum not exceeding the interest of their presumptive portions, and, also, to apply any sum of money, out of the shares of the male children, for their advancement. So that the effect of this first

(f) 1 Sim. & Stu. 61. Vol. 2, 330 note, and *ante*,
 (g) Ibid. 313. But see *ante*, Vol. 3, 466.

instrument was to make those persons who took the trusteeship of the deed, co-operate with the persons who should be appointed testamentary Guardians.

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The second instrument, which is dated in July 1834, is, in effect, the same, except that, instead of giving an annuity to Lady *Dorothea*, it gives her a life interest in the fund comprised in that deed; and then, by words of reference, the Trusts of the deed of March 1817 are embodied in the deed of July 1834.

I should have mentioned that the Trustees of the second indenture are Mr. *Home* and Lord *Sligo*; but, they, equally with Mr. *Mackay* and Mr. *Campbell*, undertook, when they took upon themselves the trusteeship of that deed, to co-operate with those who should be appointed the testamentary Guardians.

Then Sir *James Campbell*, by his will (which was made very shortly after the deed of July 1834) gives a sum of 15,000 *l.* to Mr. *Mackay*, Mr. *Campbell* and Mr. *Home*, upon Trust, virtually, for his three daughters, with certain powers of maintenance, which, upon the face of them, were discretionary in the three Trustees; and it is provided that if all the daughters should die under the age of 21, or without having been married according to the provisions of the will, then the 15,000 *l.* should sink into the residue; and the residue itself is given to the same Trustees, for the benefit of the son, the other child; and there is a direction that the Trustees should apply a competent part, at their discretion, of the interest and dividends arising from the residue, for the maintenance and education of the son, and should, from time to time, invest the residue of such dividends for the purpose of accumulation;

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and then there is a direction that, if the son dies without attaining a vested interest, the residue itself shall become the property of the three daughters: and, if they do not attain a vested interest in it, then the residue with its accumulations, (including the 15,000 l.) is given to the Defendant *Charles Campbell*, one of the Trustees: and then the Testator appoints Messrs. *Mackay, Campbell* and *Home* his executors, and those three, together with Lady *Dorothea*, the Guardians of his children. Messrs. *Mackay* and *Campbell* proved the will, power being reserved to Mr. *Home* to come in and prove it.

It does not appear to me that any thing is stated in the bill, which it is very material to notice: but the bill having been filed by Lady *Dorothea* and her four children, Messrs. *Mackay, Campbell* and *Home* think it a right thing to put in a demurrer for multifariousness.

Now that, to a certain extent, the matters with regard to which the direction of the Court is sought by the bill, are multifarious, is undeniable; because the sums which are settled by the deed of March 1817, are, in themselves, wholly separate from the sum which is settled by the deed of July 1834; and all of them are quite independent of the personal estate. But, in my opinion, there cannot be a due execution of the discretion with regard to the maintenance, which is inherent in the Trustees as Trustees and inherent in the Guardians as Guardians, without the Court having before it, at the same time, the administration both of the whole personal property which is given by the will, and also that property which is the subject of the Trusts of the two indentures; and, therefore, it appears to me that though the Court itself might, perhaps, find

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some inconvenience in the execution of the Trusts of these three instruments, yet the only persons who ought not to complain are those gentlemen who have thought proper to complain; because they are parties who, by accepting the Trusts of the deeds, have bound themselves to co-operate with the Guardians, and have consented to be Co-Guardians with Lady *Dorothea Campbell*: and it appears to me, therefore, notwithstanding any theoretical proposition with regard to the original multifariousness of the subject matter, the properties to which the bill relates are so blended together, that it is quite impossible duly to administer the Trusts of any one, without having the others before the Court: and my opinion, therefore, is that the demurrer ought to be overruled.*

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* Affirmed by the Lord Chancellor. 1 Myl. & Craig. 603.

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BY lease and release of the 13th and 14th of September 1763, being the settlement made on the marriage of *John Russell Moore* with *Elizabeth* the daughter and only child of *John Hartnoll*, the manor of *Cadleigh* and certain other hereditaments in the county of *Devon*, were conveyed to *John Russell Moore* for his life, with remainder to *Elizabeth Hartnoll*, for her life, with remainder to *Richard Blundell* and *William Moore* and their heirs, during the several lives of *John Russell Moore* and *Elizabeth Hartnoll*, in Trust to preserve contingent remainders, with remainder to the same Trustees for the

By a marriage settlement, an estate was limited to the husband for life, remainder to the wife for life, remainder to Trustees, during their lives, to preserve, &c., remainder to the same Trustees for 500 years, remainder to the sons of the marriage in tail. The Trusts of the term were, in case the husband should die leaving issue by the wife a son who should attain 21 and one or more other children, to raise, after the deaths of the husband and wife and the commencement of the term, but not before, unless the husband should so direct, (there being a son then living) a certain sum for the portions of such other children, share and share alike, and to survive to the survivors and survivor of them, the shares to be paid to them on attaining 21, (if sons) or 18 or marrying (if daughters) which should first happen, in case it should so happen after the deaths of the husband and wife, otherwise, within three months after the death of the survivor of the husband and wife. Provided that if the husband should, in exercise of a power given to him by the settlement, appoint the estate to a younger son, then the elder son should be entitled to a share of the sum to be raised for portions. Provided also that, until the portions should become payable, the Trustees should, out of the rents of premises comprised in the term, and after the commencement thereof, maintain the children: and that the husband and wife, during their respective lives, and the Trustees, during the joint lives of the husband and wife and during the term, should have power to lease the premises for 14 years. There was issue of the marriage a son and three daughters, all of whom attained the required age, and all but one daughter survived the husband and wife. Held that that daughter was not entitled to a portion.

term of 500 years upon the Trusts after mentioned, with remainder to such son of the marriage as *John Russell Moore* and *Elizabeth Hartnoll* should jointly appoint, in tail, with remainder to the first and other sons of the marriage successively in tail, with remainder to the daughters of the marriage as tenants in common in tail, with divers remainders over: and it was declared that the Trustees should stand possessed of the term, in case *John Russell Moore* should happen to die *leaving* issue by *Elizabeth Hartnoll* an eldest or only son who should live to attain his age of 21 years or die before and leave such issue, and one or more younger son and sons, daughter and daughters, or daughter or daughters only of the marriage, then upon trust that the Trustees should, by and out of the rents, issues and profits of the premises comprised within the term, or by mortgage or sale thereof or a competent part thereof, for all or any part of the term of 500 years, or by all or any of the said ways as they should think fit, *after the several deaths of John Russell Moore and Elizabeth Hartnoll and the commencement of the term, but not before or sooner*, unless *John Russell Moore* should, by any writing under his hand, request or direct the same, but without prejudice to the several estates and interests limited to and in Trust for *Elizabeth Hartnoll* as aforesaid, levy and raise, for the portion or portions *of the daughter and daughters and younger child and children of John Russell Moore and Elizabeth Hartnoll*, (there being an elder or only son, or the heirs of the body of such son *then* living) the several sum or sums of money next thereafter mentioned, (that is to say) if there should be only one such younger child, be it either a son or a daughter, the sum of 2,000 *l.*, for the portion of such only child, and in case there should be two such younger children and no more, the sum of 3,000 *l.*

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for the portions of such two younger children, and if there should be three or more such younger children, then the sum of 4,000 *l.*, for the portions of all and every such younger children, share and share alike, *and to survive to the survivors and survivor of them*, but so as such two *surviving* younger children should have no more raised for their portions than the sum of 3,000 *l.* nor any one such surviving child any more than the sum of 2,000 *l.*, the share or part of such of them as should be a daughter or daughters *to be payable and be paid to her or them, at her or their respective age or ages, of 18 years or day or days of marriage* which should first happen, in case it should so happen, *after the several deaths of John Russell Moore and Elizabeth Hartnoll, otherwise, within three calendar months next after the death of the survivor of them*, and the part or share of such of them as should be a son or sons to become payable and be paid at his or their respective age or ages of 21 years *or sooner*, if *Richard Blandell and William Moore* or the survivor of them, his executors, administrators and assigns, should, after the several deaths of *John Russell Moore and Elizabeth Hartnoll*, in their discretion, judge the same necessary for his or her advancement.

Provided that in case *J. R. Moore* and *Elizabeth Hartnoll*, should, in execution of the power thereinbefore given them for that purpose, appoint the premises to any younger son in prejudice to and to take place of the eldest son of the marriage and the heirs of his body, whereby such younger son and the heirs of his body would be preferred to and take before the eldest son and the heirs of his body, then such eldest son should be considered as a younger child, and, as such, have a share of the portions to be raised for the younger

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children of the marriage if more than one, or the intended portion to be raised for the younger child, if he, in that case, should, by the appointment to his prejudice as aforesaid, be considered as such only younger child.

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Provided also that, until the portions should become payable, the Trustees, should, out of the rents, issues and profits of the premises comprised in the term, *and after the commencement thereof*, raise and levy such sum and sums of money for the maintenance and education of such child or children as to them, the Trustees, should seem meet, such maintenance not exceeding, in the whole, the interest of the children's respective portions after the rate of 3*l.* 10*s.* per cent. per annum.

And it was declared that it should be lawful for *J. R. Moore*, from time to time during his life, and also for *Elizabeth Hartnoll*, in case she should survive her intended husband and during her life, and also for the Trustees, during the joint lives of *J. R. Moore* and *Elizabeth Hartnoll* and during the term of 500 years, and for all other persons to whom any estate in the premises was thereby limited, when they should respectively be in possession, by indenture under their hands and seals, to lease all or any part of the messuages, lands, tenements, hereditaments and premises or any part or parts thereof which then were or should thereafter come into possession, and intended to be thereafter kept in demesne as thereafter mentioned, for any term not exceeding 14 years in possession.

There was issue of the marriage one son, *John Hartnoll Moore*, and three daughters.

By articles made in contemplation of the marriage of

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John Hartnoll Moore with Elizabeth Ley Dir, dated the 12th of April 1787, after reciting the settlement of September 1763, and that there were such children of *J. R. Moore* and *Elizabeth* his wife as before mentioned: it was agreed (amongst other things) that a certain part of the hereditaments comprised in the settlement should be limited to the use of *Sir J. Duntze, J. Sanders* and *D. Hamilton*, for the term of 1,000 years, by way of mortgage, for securing to them the payment by *J. Russell Moore* of 500 *l.* with interest, and, subject thereto, to the uses, upon the Trusts, and under and subject to the powers, provisoes, conditions and limitations contained in the settlement prior to the limitations to the sons of *J. R. Moore* and *Elizabeth* his wife, with remainder to *R. Blundell* and *W. Moore*, the Trustees named in the settlement as to the term of 500 years, for the same term of 500 years, upon Trust, by the same ways and means as in the settlement were contained and provided for raising the portions for daughters and younger children, to raise and levy the sum of 2,000 *l.* over and above the 4,000 *l.* provided for the three daughters of *J. R. Moore*, and to pay the same to them on their attaining the age of twenty-one or being married, (which should first happen) with the consent of *J. R. Moore* and *Elizabeth* his wife or the survivor of them.

By indentures of lease and release and settlement of the 30th and 31st of October 1788 and by a recovery, made and suffered in pursuance of the articles and for carrying the same into effect, part of the hereditaments comprised in the settlement of 1763, was limited, subject to the term of 500 years created by that settlement and to the Trusts thereof, to the use of *Duntze, Sanders* and *Hamilton* for the term of 1,000 years, for securing the 500*l.*, and, subject thereto, to the uses, upon

the Trusts, and under and subject to the powers, provisions, conditions, limitations and agreements contained in the settlement of 1763, prior to the limitations to or in Trust for the sons or children of *J. R. Moore* and *Elizabeth* his wife ; and, after the decease of the survivor of *J. R. Moore* and *Elizabeth* his wife, to the use of *R. Blundell* (*W. Moore* being then dead) for the term of 500 years, upon Trust, by the same ways and means as, and by the settlement of 1763, were contained and provided for raising portions for the daughters and younger children of *J. R. Moore* and *Elizabeth* his wife, to raise and levy the sum of 2,000 *l.* over and above the portions by the same settlement provided for such daughters and younger children, and to pay the same to them in increase of their said fortunes, in the same manner, at the same ages and times, and with the same benefit of survivorship as by the same settlement was and were provided and declared touching the portions thereby directed to be raised for such daughters and younger children.

Elizabeth, one of the daughters of *J. R. Moore* and *Elizabeth* his wife, intermarried with *William Peppin* and died in 1805, in the lifetime of her parents. *Elizabeth Moore* survived her husband *J. R. Moore* and died in 1820.

The bill, which was filed by the representatives of Mrs. *Peppin*, against *John Hartnoll Moore* and other persons interested in the premises comprised in the term of 500 years created by the settlement of 1763, alleged that, upon the clear and obvious construction of the declaration of the Trusts of the term of 500 years created by that settlement, the portions of the younger children of *J. R. Moore* and *Elizabeth* his wife, became vested

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in such younger children on their attaining 18 or marrying, and were not contingent upon such younger children surviving their parents, so that the one-third share of Mrs. *Peppin* vested in her upon her marriage, with a suspension only of the period of payment until the decease of the survivor of her parents, and that, upon the decease of her mother, the two sums of 4,000*l.* and 2,000*l.* secured by the two several terms of 500 years and 500 years, became raiseable and divisible amongst Mrs. *Peppin* and her two sisters, in equal shares. The bill further alleged that the sisters had been paid their shares of the 4,000 *l.* and 2,000 *l.*; and it prayed that Mrs. *Peppin*'s share of those sums, together with interest from her mother's decease, might be raised under the Trusts of the terms of 500 years and 500 years, and paid to the Plaintiffs.

The answers submitted that Mrs. *Peppin*, in consequence of her having died in the lifetime of her parents, did not become entitled to any share either of the 4,000 *l.* or 2,000 *l.*

Mr. *Beames* and Mr. *Spurrier*, for the Plaintiffs:

The object of this suit is to have the portions to which Mrs. *Peppin* was entitled under the settlements of 1763 and 1788, raised and paid to the Plaintiffs. The principal question is whether the portion under the first settlement, vested in Mrs. *Peppin* on her attaining 18 or marrying, or whether it was necessary that she should survive her parents. We contend that, according to the doctrine laid down in *Howgrave v. Cartier* (a) and *Fry v. Lord Sherborne* (b) the portion vested in Mrs. *Peppin* on her attaining 18 or marrying, and that it was not necessary for her to survive her parents. In the first

(a) 3 V. & B. 79. See 85. (b) *Ante*, Vol. 3, p. 243.

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place, the event happened on which the portions were to be raised: for *J. R. Moore* died leaving a son, who attained 21, and three daughters. And wherever a settlement is executed on a marriage and portions are provided for daughters, which are to be paid to them on their attaining a particular age or marrying, which shall first happen after the death of their surviving parent, the Court implies that the parties intended that the portions should vest in the daughters on their attaining the given age or marrying, whether they survived their parents or not. Even if language is used in the settlement which, according to its literal construction and *prima facie* meaning, imports that the daughters are not to take unless they survive their parents, the Court will struggle with the language, and avail itself of any loop-hole in order to carry the natural intention into effect, and make the portions vest at the given age or on marriage. *Cholmondeley v. Meyrick* (c), *Hope v. Lord Clifden* (d), *Powis v. Burdett* (e), *Woodcock v. The Duke of Dorset* (f). Under the clause which declares the Trusts of the 500 years' term, *John R. Moore* is enabled to accelerate the raising of the portions. This shows, conclusively, that, in one case at least, the portions might vest in the younger children before the death of the surviving parent. The counsel for the Defendants have to make out that in no case could the portions vest unless the children survived both their parents: for, wherever there is any inconsistency in the language of the settlement—wherever the portions may be vested in any one case, the Court holds them to be vested in all cases (g). By giving the father power to accelerate the raising of the portions, the par-

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| (c) 3 Bro. C. C. 253. S. C. | (e) 9 Ves. 428. |
| 1 Eden. 77. | (f) 3 Bro. C. C. 569. |
| (d) 6 Ves. 499. | (g) <i>Ante</i> , Vol. 3, p. 255. |

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ties virtually say that the portions were to become vested in the children, who were not to be under the necessity of surviving their parents.

The leasing power creates another incongruity with the construction contended for by the Defendants. It is a power, given to the Trustees, to lease the estate during the joint lives of Mr. and Mrs. *Moore* and during the term of 500 years, that is, before the commencement, as well as during the continuance of the term. This power, therefore, was given with a view to the portions being raised in the lifetime of the parents; and, consequently, it is confirmatory of the clause which enables the father to accelerate the raising of the portions.

The case of *Fry v. Lord Sherborne* closely resembles the present case. It is clear that, as in that case, the event did happen on which the portions were to be raised. There were three daughters of the marriage; and some of them, indisputably, were entitled to their portions. Here it is provided that, whether the daughters attain 18 or marry after the death of their parents or before, the portions shall equally be paid to them. The same provision is found in *Fry v. Lord Sherborne*. Maintenance also is provided; and, in that as well as in this case, not until after the deaths of the parents. In both cases too it is provided that the portions may be raised although the daughters have neither attained the required age nor are married. In one respect this case is stronger than *Fry v. Lord Sherborne*: for there it was extremely doubtful whether the term had not ceased; but no such difficulty occurs in this case; for there is no proviso for the cesser of the term. Upon the whole, we submit that the Court cannot hold Mrs. *Peppis* not

to be entitled to a share of the sum to be raised under the deed of 1783, without over-ruling a long line of cases ending with *Fry v. Lord Sherborne*.

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It is clear that the additional portions were vested under the articles of 1787. Although the settlement of 1788 differs, in some respects, from those articles, yet as it recites them and was made, expressly, for carrying them into effect, it must be controlled by them; and, consequently, *Mrs. Peppin* became entitled to the additional as well as to her original portion.

Mr. Kindersley and *Mr. Campbell*, for the Defendant *John Hartnoll Moore*:

This case differs, in many important particulars, from every case that has been cited. In the declaration of the trusts of the term, the first words are: "In case the said *John Russell Moore* shall happen to die leaving issue by the said *Elizabeth Hartnoll* his intended wife." Then follow these words: "After the several deaths of them the said *John Russell Moore* and the said *Elizabeth Hartnoll*, and commencement of the said term, but not before or sooner, raise and levy for the portion or portions &c. &c. there being an elder or only son or the heirs of the body of such son *then* living." The period to which the word, *then* refers is the death of the survivor of *Mr. and Mrs. Moore*. But it does not rest there: for, after mentioning the sums to be raised, the clause continues thus: "And to survive to the survivors and survivor of them." What did the parties to the settlement mean by the words, "survivors or survivor"—to what period did they refer? They must have referred to that period at which it was to be ascer-

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tained whether there was an elder or only son living, namely, the death of the surviving parent. Wherever a fund is given to A. for life, and, after his death, to a class of persons or the survivors or survivor of them, the period at which the survivors are to be ascertained, is the death of the tenant for life: until that event happens, the portions are contingent. It must be remembered that the words to which we have alluded, occur in the very substance of the gift: that distinguishes this from every other case. The persons who claim under this gift, must show that they come within the very terms of it. The clause then goes on: "But so as such two surviving younger children &c." What does the word, *surviving* here mean, except living at the deaths of the husband and wife? The subsequent words: "To be payable and be paid &c." do not affect the question; for they are unconnected with the prior gift. The fact is that the real question in this case, is not whether the portions are to be raised or not; but what is the construction to be put on the words: "and to survive to the survivors and survivor of them," that is to say, into how many shares the sum to be raised is to be divided.

With respect to the arguments founded on the power given to the father to accelerate the raising of the portions, we have to remark that that power never was exercised. Besides, the father, was entitled, by virtue of it, to provide, if he thought fit, for a child who might marry and die in his lifetime; and, therefore, the Court is not under the same necessity of struggling with the language of the settlement, as it was in the case of *Powis v. Burdett* and in the other cases that have been cited.

Then, as to the leasing power.—Life-estates were given to the parents, and the Trustees had a vested estate during the lives of the parents. The power followed the estates that had been limited before; the intention of the framer of the settlement being to give the leasing power to the Trustees in case the parents should forfeit their life-estates.

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The only cases to which we shall refer as supporting our argument, are *Hotchkin v. Humfrey* (h) and *Fitzgerald v. Field* (i). Although those cases may not be similar in their circumstances to the present, the principle of them is applicable to it.

Mr. Knight, Mr. Burge, Mr. Parker, Mr. Duckworth, Mr. Wood and Mr. Harwood appeared for the other Defendants.

THE VICE-CHANCELLOR:

This case has been fully argued; it lies, however, in a very small compass. It is quite unlike the case of *Fry v. Lord Sherborne* and other cases, in which the settlement contained a variety of clauses, which were inconsistent with each other; and the Court had to put a construction on the whole of the instrument, having regard to every part of it.

I certainly take the rule for construing instruments of this kind, to be that which was laid down by the Master of the Rolls, Sir W. Grant, in the case of *Howgrave v. Cartier*, and which was approved of, expressly, by Sir Thomas Plumer, when he was Vice-Chancellor, in deciding the case of *Hotchkin v. Humfrey*. Sir

(h) 2 Madd. 65.

(i) 1 Russ. 430.

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Thomas Plumer, having quoted a passage from the judgment of Sir *W. Grant* in *Howgrave v. Cartier*, says: "Wherever therefore the intent can be clearly collected, that must govern; and, in this case, I think there is a clear intent that the surviving children were, exclusively, to take."

In this case, there being nothing in the reciting part of the settlement of 1763, which tends to show that the parties meant that the issue of the marriage or any particular description of the issue should take, the settlement contains a limitation of the estate to the husband for life, and then to the wife for life, and then to the use of the Trustees for the term of 500 years, and then to the use of such son of the marriage as the husband and wife should jointly appoint, in tail, and, in default of appointment, to the sons, successively, in tail; and then follows the clause which declares the Trusts of the term of 500 years, there being nothing whatever to lead to it, and that being the only passage that shows the intention of the parties as to the Trusts of the term: "It was thereby declared that the said *Richard Blandell* and *William Moore*, their executors, administrators and assigns shall stand and be possessed thereof, in case *John Russell Moore* shall happen to die leaving issue by *Elizabeth Hartnoll*, his intended wife, an eldest or only son who shall live to attain the age of 21 years, or die before and leave such issue, and one or more younger son and sons, daughter and daughters, or daughter or daughters only of the said intended marriage, upon trust that the said Trustees shall, by and out of the rents, issues, and profits of the said premises comprised within said term, or by mortgage or sale thereof or a competent part thereof for all or any part of the said term of 500 years, or by all or any of the said ways as they shall think fit, after the

several deaths of them the said *John Russell Moore* and *Elizabeth Hartnoll* and commencement of the said term, but not before or sooner, unless the said *John Russell Moore* shall, by any writing under his hand, request or direct the same, but without prejudice to the several estates and interests limited to and in Trust for the said *Elizabeth Hartnoll* as aforesaid, raise and levy, for the portion or portions of the daughter and daughters and younger child and children of the said *John Russell Moore* and *Elizabeth Hartnoll*, there being an elder or only son or the heirs of the body of such son then living, the several sum and sums of money hereinafter next mentioned (that is to say) if only one such younger child, the sum of 2,000 *l.* for the portion of such only child, and in case there shall be two such younger children and no more, the sum of 3,000 *l.*, and, if three or more such younger children, the sum of 4,000 *l.* for the portions of all and every such younger children, share and share alike, and to survive to the survivors and survivor of them, but so as such two surviving younger children shall have no more raised for their portions than the said sum of 3,000 *l.*, nor any one such surviving child, any more than the said sum of 2,000 *l.*, the shares of daughters to be paid to them at the age of 18 years or days or day of marriage, which shall first happen, in case it shall so happen, after the several deaths of the said *John Russell Moore* and the said *Elizabeth Hartnoll*, otherwise within three calendar months next after the death of the survivor of them, and the part or share of such of them as shall be a son or sons to become payable and be paid to them at the age of 21 years or sooner if the said *Richard Blundell* and *William Moore* or the survivor of them, his executors, administrators and assigns, shall, after the several deaths of the said *John Russell Moore* and the said *Elizabeth Hartnoll*,

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his intended wife, in their discretion, judge the same necessary for his or her advancement."

Then there is a proviso by which it is declared that, in case *J. R. Moore* and his wife should, by any deed or instrument executed according to the power given them, appoint the estate to a younger son, then the eldest son should become a younger son for the purpose of taking a share of the portions to be raised: and then there is a further proviso that, until the portions should become payable, the Trustees should, after the commencement of the term, raise and levy such sums as to them should seem meet for the maintenance of the younger children.

It does not appear to me, on any consideration that I have been able to give to this case, that what is contained in the power of leasing, which is given to those persons who were both the Trustees of the freehold which might continue during the lives of the husband and wife or either of them, after the forfeiture or other determination of their estates in their lifetimes, and who are also the Trustees of the term, at all affects the case: it has not, in my opinion, the least connection with the question that is now before me.

Then, with respect to the words used in declaring the Trusts of the 500 years' term.—In the first place, the contingency upon which the Trusts of that term are to arise, is pointed out in the plainest manner. That contingency is, in case *John Russell Moore* shall happen to die leaving issue by his wife an eldest or only son who should live to attain 21 or die before and leave such issue and one or more other child or children: then, if that event happens, the Trustees are, after the deaths of

the husband and wife and the commencement of the term (by which, it is plain, is meant the commencement of the term in possession), but not before, unless the husband should so direct by any writing under his hand, to raise and levy certain sums for the portion or portions of the daughter and daughters and younger child and children: but that clause does not direct that the Trustees shall pay the portions except after the deaths of the husband and wife, even if the husband shall think proper to direct the portions to be raised at an earlier period: and it is observable that this sort of provision is to be found in the settlement of 1771, which is the subject of discussion in the case of *Fry v. Lord Sherborne*: and I observe that, in that case, there is an express provision as to what is to be done with the money that might happen to have been raised in the event of there being no child to take it. One can easily understand that there might be some circumstances arising which might make it convenient to raise a sum of money by mortgage or sale, upon certain terms perhaps, during the life of the husband and wife, and yet that the sum might not become payable until there were children who, under the terms of the settlement, would become entitled to receive it.

No one can look at this one short clause in this settlement of 1763, without seeing that it is framed in quite the infancy of conveyancing, so far at least as the framer of the settlement was concerned. It directs that the Trustees: "Shall raise and levy, for the portion or portions of the daughter and daughters and younger child and children of the said *John Russell Moore* and *Elizabeth Hartnoll* (there being an elder or only son or the heirs of the body of such son then living) the several sum and sums of money

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hereinafter next mentioned." And it certainly appears to me, upon the best consideration that I can give this point, that the words: "there being an elder or only son or the heirs of the body of such son then living," are words by which the framer of the settlement does, in effect, refer back to the very contingency upon which the Trusts were to arise, namely, the contingency of there being an eldest son or heirs of his body, and persons answering the description of daughters and younger children: and the word, 'Then,' does, of necessity, refer to the time which is spoken of in the former part of that clause, namely, the death of the survivor of the husband and wife. Then the sums to be raised are mentioned to be 2,000 *l.* if there should be one younger child, 3,000 *l.* if two, and 4,000 *l.* if more than two younger children, for the portions of such younger children, share and share alike, and to survive to the survivors and survivor of them. In my opinion the natural meaning of these words: "survive to the survivors or survivor of them," is that if, at the death of the surviving parent, there were several children, some of whom might attain 21, if sons, or might attain 18 or be married, if daughters, those who did not attain 21, being sons, or did not attain 18 or marry before that time, being daughters, should lose their shares, and the shares which they would have taken, should go to the survivors and survivor, that is, in fact, to the others and other of them who did attain 21, being sons, or attain 18 or marry, being daughters. Then come the first words that speak of payment: "The share or part of such of them as shall be a daughter or daughters, to be payable and be paid to her or them at her or their respective age or ages of 18 years, or day or days of marriage, which shall first happen, in case it shall so happen, after the several deaths of them the said *John R. Moore* and the said *Elizabeth Hartnoll*,

otherwise within three calendar months next after the death of the survivor of them ; and the part or share of such of them as shall be a son or sons to become payable and be paid at his or their respective age or ages of 21 years, or sooner if the said *Richard Blundell* and *William Moore*, or the survivor of them, his executors, administrators and assigns shall, after the several deaths of the said *John Russell Moore* and the said *Elizabeth Hartnoll*, his intended wife, in their discretion, judge the same necessary for his or her advancement." So that there is no time of payment whatever pointed out except that time which should come after the deaths of the husband and wife. If the children do attain the age of 21, being sons, or attain the age of 18 or marry, being daughters, in the lifetime of either of their parents, then the payment is to be made within three months after the death of the surviving parent ; but if they do not attain 21, being sons, or attain 18 or marry, being daughters, until after the death of both their parents, then the payment is to be made when they shall have respectively attained those ages or be married. Therefore it is quite obvious, on the face of this instrument, that there is no time of payment whatever contemplated, except one that shall follow the deaths both of the father and the mother.

That the language of this clause is not so full and accurate as that which is used by conveyancers of the present time, is quite manifest, because the whole right to take by survivorship, is made to depend on the words : " And to survive to the survivors or survivor."

It is observable, moreover, that the clause which provides for advancement, is a clause which is itself to take effect after the death of the survivor of the husband and the wife : and the power which is given to the husband

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and the wife to appoint the estate to any son, is a power which, necessarily, during the joint lives of the husband and wife, would make it impossible for any younger son to attain a vested interest in a portion ; because it is provided that in case the husband and wife do appoint the estate to any younger son, then the elder son shall become a younger son, which is utterly inconsistent with the notion of the younger son having previously obtained a vested interest in any part of the sums to be raised. It is quite obvious that the parties meant that every thing, as far at least as that power was concerned, should remain in suspense, and no vested interest be acquired during the joint lives of the husband and wife.

Then there follows a clause which provides for maintenance : and that is a clause which manifestly refers to the same period, namely, the time when the father and mother should be both dead ; because it directs that, until the portions should become payable, the Trustees should, after the commencement of the term, which clearly means the time when the term should take effect in possession, raise and levy such maintenance, not exceeding a certain sum, as they should think proper.

There is therefore no necessary inconsistency in the different parts of this settlement, which compels me to say that I am to put some construction upon the preliminary words, so as to enable children to take who do not answer the description of children that survive both their father and mother. The only part that bears any show of inconsistency (and that is not necessarily inconsistent with the other parts of the instrument) is the clause whereby the Trustees are enabled to raise the portions in the lifetimes of the father and mother : and, even in that very clause, there is no direction that the

portions shall be paid before the deaths of the father and mother.

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My opinion therefore is that this is a case in which I am bound, by the description that has been used throughout the deed, to say that no persons were intended to take the portions, unless they answered the description of daughters or younger children who were living at the time when both the mother and father were dead.

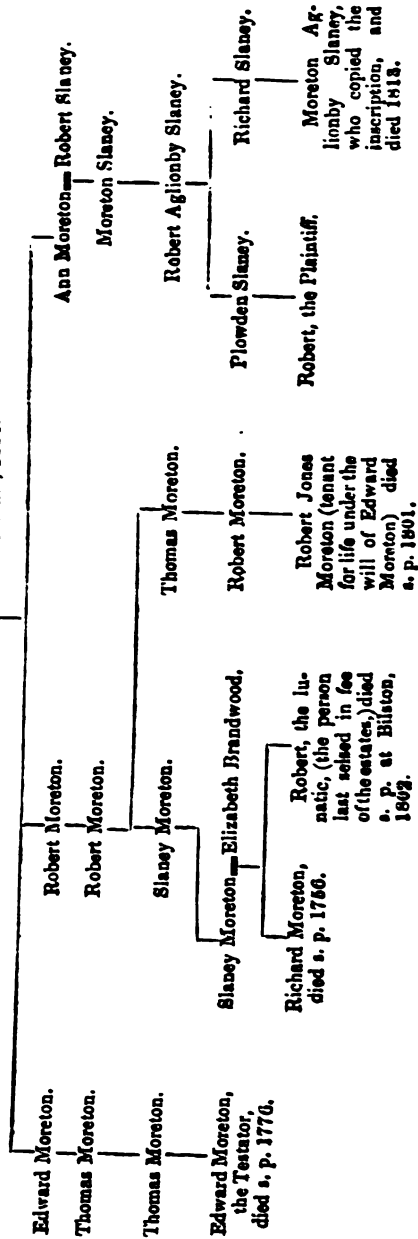
Then, with respect to the additional sum of 2,000 *l.* provided by the settlement of 1788.—You will observe that it is no part of the provision for the children of the marriage which was then in contemplation: but it is another bargain made for the purpose of giving a benefit to the children of the father of the intended husband. It is but reasonable to suppose that the parties knew what they were bargaining for: and although I admit that, to a certain extent, the articles are inconsistent with the settlement, yet, when the parties come to perfect that very intention which is expressed in the articles, they do, by words of plain reference, make the additional portions depend on precisely the same circumstances as those under which the original portions were given. The 2,000 *l.*, therefore, must share the same fate as the 4,000 *l.**

* Affirmed by The Lord Chancellor, 30th August 1837.

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THOMAS MORETON, — ELIZABETH MORETON,
died at Shiffnal, 1634. died at Shiffnal, 1664.



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1836:
8th, 9th & 13th
of January.

Evidence.
Pedigree.

THE bill stated that the Rev. *Edward Moreton*, by his will dated the 11th of June 1773, gave his estates at *Kemberton* and in the town and parish of *Shiffnal* in *Shropshire*, (in remainder expectant on certain prior limitations that never took effect) to *Robert Jones Moreton* for life, with remainders to his first and other sons successively in tail, with remainder to the Testator's own right heirs: that the Testator died in February 1776: that *Robert Jones Moreton* died without issue, in 1801; and, at his death, *Robert Moreton*, late of *Bilston* in the county of *Stafford*, a lunatic, was the Testator's right heir, and, as such, was seised of the estates subject to a mortgage that had been made thereof in pursuance of a direction in *Edward Moreton's* will: that the Testator and *Robert Moreton*, were both lineally descended, in the male line, from *Thomas Moreton* and *Elizabeth* his wife: that *Robert Slaney*, the paternal grandfather of the Plaintiff's paternal grandfather, married *Ann*, the daughter of *Thomas* and *Elizabeth Moreton*, and that all the descendants of *Thomas* and *Elizabeth Moreton*, except the issue of their daughter *Ann*, had become extinct: that the Plaintiff was the right heir of *Robert Slaney* and *Ann* his wife, and also of *Edward Moreton*, the Testator, and of *Robert Moreton*; and, as such, the ultimate remainder or

An inscription, giving an account of the *Moreton* family, on the wall of a chancel in a church called the *Moreton* Chancel, in which some of the family (who had resided and had property in the parish) were buried, was held good evidence of Pedigree: and, the inscription having been effaced, copies of it, one of which had been made in pencil, and was afterwards traced over with ink (but by whom did not appear), were received as evidence of its contents.

A.'s title to property depended on his being a child of the marriage of *B. & C.* and the representative of a Trustee conveyed the property to him by a deed reciting that he was such child. Held that the deed was evidence of *B.'s* legitimacy, although the suit did not relate to the property, and the parties to it were not parties to the deed.

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reversion in fee limited by the will of *Edward Moreton*, and which descended to *Robert Moreton*, did, upon his dying intestate and without issue, descend to and was then vested in the Plaintiff, subject to the mortgage, which had become vested in the Defendant under *Robert Jones Moreton's* will. The bill prayed for a redemption of the mortgage.

The Defendant pleaded that the Plaintiff was not the heir of the Testator: whereupon it was ordered, by consent, that the plea should be taken for an answer raising the questions whether the Plaintiff was the heir of the Testator and the heir of *Robert Moreton*, the lunatic; that two issues should be tried in order to determine those questions; and that the evidence taken in the cause of such of the Plaintiff's witnesses as might be dead or unable to attend, should be read at the trial.

At the trial, the Plaintiff, in order to prove the first line of the pedigree, gave evidence of an inscription relating to the *Moreton* family, which, beyond the memory of any of the witnesses, had been painted or written on the wall of a chancel, called The *Moreton* chancel, in the parish church of *Shiffnal*, in which parish the *Moreton* family had had an estate; and some of its members had resided there and been buried in the chancel. In 1810, on the church being repaired, the wall was washed or coloured over and the inscription obliterated, and the chancel was added to the vestry.

The evidence given of this inscription, consisted of copies not materially differing from each other. The first was in the handwriting of a schoolmaster, named

Morrey, who died in 1775 : and there was an indorsement on it, in the handwriting of *Moreton Aglionby Slaney*, who was an attorney and a member of the family, and died in 1813. The indorsement was as follows : "Copied from the *Moreton* chancel, I believe, by *George Morrey*, schoolmaster." The second was in the handwriting of *Moreton Aglionby Slaney*. Both these copies were produced from the custody of the *Slaney* family. The third copy was taken about the time when the repairs were commenced, at the suggestion of Mr. *Hine*, the then vicar, who was since dead. It was made in the following manner : *Ames*, the parish clerk, read the inscription, word by word, to one *Adams*, a schoolmaster, and the latter wrote it down in pencil, and then compared, what he had written, with the inscription. The copy was then delivered to Mr. *Hine*, and he and *Ames* signed a memorandum, written with ink at the bottom of it, in the following words : " Copy of writing on vestry wall, *Shiffnal*, taken July 25th, 1810." The letters in the body of this copy were afterwards traced over with ink, and it was then annexed to the parish register.

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Ames was examined, in London, as a witness in the Chancery suit. He died soon afterwards ; and his deposition, which was read at the trial, first detailed the contents of the inscription, and then proved, as an exhibit, a copy of the transcript made by *Adams*. At the trial, that transcript was proved by *Adams*.

The inscription, according to the copy made by *Moreton Aglionby Slaney*, was as follows : " *Thomas Moreton*, Esq., married *Elizabeth*, daughter of *Edward Moreton* of *Engleton*, com. *Stafford*, Esq., and had issue *Richard*, *Edward*, *Thomas* and *Robert* and

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six daughters. The said *Thomas Moreton*, the father, was here buried, the 15th July, anno Dom. 1634. The said *Richard Moreton* was here also buried the 30th day of August, anno Dom. 1658. He died without issue. The said *Thomas Moreton*, the son, was here also buried, the 18th day of August 1662. The said *Elizabeth Moreton*, the mother, was here also buried, the 29th day of June 1664. The said *Edward Moreton* married *Mary*, daughter of — *Yates* of *London*, gentleman; and the said *Edward* died and was buried in *London*, in September 1665. He left issue only *Thomas* his son. The said *Robert* was here also buried the day of January 1676. The aforesaid *Thomas Moreton*, son of *Edward*, married *Mary*, daughter of *William Price* of *Christioneth* in the parish of *Ruabon*, in the county of *Denbigh*, gentleman, and dying in December 1702, he lieth buried in the church of *Ruabon* aforesaid, leaving issue only *Thomas* his son: and which last mentioned *Thomas Moreton* dying at *Christioneth* aforesaid, was buried here on the 28th November 1710, in a coffin covered with lead. He left, by *Anne* his wife, daughter of *Kendrick Eyton*, Esq., issue only two sons, *Thomas* and *Edward*. *Thomas*, the eldest son, died August 3d, 1736, and was buried in *Ruabon* church." This copy was indorsed, in *M. A. Slaney's* handwriting, as follows: "Monuments in the *Moreton* chancel of *Shiffnal*, copied in February 1796."

In making out the second line of the pedigree, the Plaintiff, in order to prove that *Robert Moreton*, the lunatic, was the legitimate child of *Slaney Moreton*, produced copies of the baptismal and burial registers of *Richard Moreton*, who was older than the lunatic, and was described, in the former, as *Richard*, the son of

Slaney Moreton, and, in the latter, as the son of *Slaney* and *Elizabeth Moreton*: and the Plaintiff produced also the will of *Elizabeth Moreton*, widow, dated the 29th of October 1782, in which the Testatrix described the lunatic as her son, and made an invalid appointment to him of certain leasehold property in *New Street, Birmingham*, which she had a power to appoint under the will of *Richard Brandwood*, her father*. The Plaintiff also produced, for the same purpose, a deed dated the 30th of November 1797, from the custody of Mr. *Frere*, the owner of the property comprised in it. It purported to be made between *Mary Stanton* of *Kenilworth*, widow, of the one part, and *Robert Moreton* of *Bilston*, gentleman, of the other part; but it was executed by *Mary Stanton* only. It recited a lease to *Richard Brandwood* of premises in *New Street, Birmingham*, for 98 years; that *R. Brandwood*, by his will dated the 9th of March 1742, gave the premises to *S. Walford* and *J. Stanton* in Trust for his daughter *Elizabeth*, for life, and, after her decease, in Trust for such child or children as she might leave behind her, in such manner as she, by her will or by any deed, instrument or writing executed in the presence of and attested by three witnesses, should appoint, and, in default of appointment, in Trust to assign the premises to such child or children which she should leave behind her, and, for want of such child or children, then to her executors or administrators: that the said *Elizabeth* afterwards intermarried with one *Slaney Moreton* of *Birmingham*, who, some time since, died, leaving the said *Elizabeth Moreton* and the said *Robert Moreton* (party thereto), the only child of the said marriage, him surviving: that *Elizabeth Moreton* had since departed this life, without having made any valid

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* *Elizabeth Moreton's* will was not properly attested.

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appointment of the premises pursuant to the power reserved to her, by means whereof the said *Robert Moreton* was become entitled to an assignment of the premises under the will of *Richard Brandwood*: that *J. Stanton* survived *S. Walford* and had since died, having appointed *Mary Stanton* (party thereto) his widow and sole executrix. The deed then assigned the premises to *Robert Moreton* absolutely.

In further proof of *Robert Moreton's* legitimacy, *R. Jones Moreton's* will was produced, in which the Testator gave a legacy to Trustees in Trust for *his relation, Robert Moreton*.*

Upon each of the issues a verdict was found for the Plaintiff. The Defendant, being dissatisfied with the verdicts because the copies of the inscription, the deed and certain other documents had been received as evidence, now moved for a new trial.

Mr. Serjeant *Talfourd*, Mr. *Barber*, Mr. *Wigram*, Mr. *R. V. Richards*, Mr. *Alexander* and Mr. *Bailey*, in support of the motion :

The contents of the inscription were not proved by legal evidence. In order to prove them, four copies were given in evidence. We shall contend that none of those copies ought to have been received : but, if we can show that any one of them or any of the other evidence that was given, ought not to have been received, we shall be entitled to a new trial. The first copy that was produced, was in the handwriting of *Morrey*; and it was sought to make it evidence by reason of the indorsement made by *Moreton Aglionby Slaney*; for it could not be contended that a paper produced, no

* The Testator also gave a legacy to *his relation, M. A. Slaney*.

matter from what custody, in the handwriting of a person who was dead and had never been examined on oath, and which related to matters in which he was not at all interested, could be received in evidence. It was said, however, that *M. A. Slaney* was one of the family, and that the paper, being authenticated by him, was evidence of reputation as to the state of the family. But *M. A. Slaney* does not authenticate the copy: he does not say that it is a true copy, but merely that he believes that the copy was made by *Morrey*. Besides, there was nothing to show when this indorsement was made: it might have been made long after *lis mota*. And there was nothing to connect *M. A. Slaney* with the *Moreton* family. There is, indeed, a legacy given to him in the will of *Robert Jones Moreton*, and he is described as a relation of the Testator; but what kind of a relation or in what manner he was connected with the family, does not appear. Therefore, he was not shown to be in a situation to give evidence of reputation as to the *Moreton* family. It is clear, therefore, that that copy was not admissible.

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Then we come to the second copy, which is in the handwriting of *M. A. Slaney*.—He does not, however, profess to have any knowledge of the contents of the inscription: he is a mere transcriber. This copy, therefore, would not fall within the principle upon which reputation is received in evidence, even if *M. A. Slaney* had stood in the situation of a person capable of giving such evidence.

Next, as to the copy which was deposed to by *Ames*.—He was not examined at *Shiffnal*, but in *London*; and he does not speak of the copy of the inscription that was made by him and *Adams*, and which was afterwards

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annexed to the register; but a copy of that copy is exhibited to him, and he says that it is a true copy of the transcript annexed to the register; or, in other words, that it is a copy of a copy.

Lastly, as to the copy made by *Adams*.—That copy was originally taken in pencil, and was afterwards inked over: that is sufficient to destroy its authenticity; for it then became a copy of a copy, just as much as if it had been taken on a distinct piece of paper. If it had remained in pencil, it might have been used for the purpose of refreshing *Adams's* recollection as to what he took down at the time. If, on its being produced to him in its original state, he had said that looking at the paper brought back the inscription to his recollection as if it were then present before him, and that he was able to say that the paper was a correct copy of what had been written on the wall, *that* would have been good evidence of the contents of the inscription. But this paper, after it has been inked over (at what time does not appear) is produced to the witness, and he says that, to the best of his belief, it is a true copy of the inscription. When, however, he is asked whether he believes it to be a true copy from his own recollection, he says that he recollects a few words only of the inscription, and that his belief is founded on the inked letters resembling his style of writing, and on his seeing some pencil marks below the ink, and the signatures of *Mr. Hine* and *Ames* at the bottom of the paper. As, therefore, *Adams's* belief was derived from other sources than recollection, the copy in question was not admissible. With respect to admitting copies in evidence, *Holt, C. J.* makes the following observation in the case of *Steyner v. The Burgesses of Droitwich (a)*:—"This is but a copy; and though an

(a) *Skin. Rep.* 623.

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old manuscript found among the evidences of a family, may be evidence, because it is an original, yet a copy would not, for it is liable to the mistake of the transcriber."

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We now come to the more important question, namely, whether, if the inscription had been in existence at the time of the trial, it could have been received as evidence of the facts which it purports to record. It professes to give a history of the *Moreton* family, all written, apparently, at one time, and extending over a period of one hundred and two years. The last event that it mentions, occurred in 1736, which was long before the recollection of the oldest witness called for the Plaintiff. There is no proof that the inscription was made by any member of the *Moreton* family, or that any one of them knew that it existed. It does not profess to record events that took place in the parish only; for most of the burials that it mentions, took place at *Ruabon* or in *London*, or elsewhere at a distance from *Shiffnal*. The principle upon which monumental inscriptions (to which the inscription in question is said to be analogous) are received as evidence, is very clearly laid down, by Lord *Eldon*, C. in *Whitelocke v. Baker* (b). His Lordship says that they are admitted on the principle that they are the natural effusions of a party who must know the truth, and who speaks upon an occasion when his mind stands in an even position, without any temptation to exceed or fall short of the truth. Monumental inscriptions are made by persons who knew the deceased and the circumstances of his life: they are declarations, made by a living witness, of facts within his own knowledge: so that as each member of a family dies, generation testifies to generation, by which means a continued history of the family is

(b) 13 Ves. 514.

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formed. But what analogy does that bear to a statement, extending from 1634 down to 1736, made no one knows when,—perhaps, long after the last occurrence which it records, and relating to events that took place in distant parts of the country : so that it is obvious that the party who put up this inscription, must have been recording transactions of which he could have no knowledge whatever.

In the first place, therefore, we submit that the Plaintiff has failed in giving sufficient proof of the existence of this inscription ; and, in the next place, that if he has given sufficient proof of its existence, it bears no analogy to a monumental inscription ; nor does it bear any resemblance to a pedigree, which remains in the possession of the family from generation to generation. *Doe v. The Earl of Pembroke (c)*.

We now come to the evidence that was given as to the legitimacy of *Robert Moreton*, the lunatic.—One piece of evidence tendered by the Plaintiff, was the will of an *Elizabeth Moreton*, widow : but she was not proved in any way, *aliunde*, to be connected with the *Moreton* family, except by the circumstance of her name being *Elizabeth Moreton* ; nor was there anything, even in the will itself, to prove any such connection. She did not describe *Robert Moreton*, the lunatic, as the son of *Slaney Moreton*, but merely as *her* son. It was of no use to show that she was the mother of the lunatic, without showing also that she was the wife of *Slaney Moreton*, and that *Robert Moreton* was born in wedlock. Besides, whatever connection this lady might have had with the *Moreton* family, her will was not receivable for the purpose for which it was tendered,

as it was a declaration made *post litem motam*: for, as we shall presently show, no evidence of reputation could be received after the death of *Edward Moreton*, the Testator, when it became the interest of parties to make themselves out to be the heir of *Edward Moreton*, with reference to the ultimate limitation in his will.

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The next piece of evidence was a deed of the 30th of November 1797. But that deed was *res inter alios acta*, and, therefore, was inadmissible. At the utmost the recitals in it could have been evidence of reputation only, and they were not admissible even in that character, as they were merely statements made by Mrs. *Stanton*, who was not proved to be dead, and was not related to any branch of the family, but was merely the personal representative of *J. Stanton*. *Johnson v. Lawson (d)*.

Next with respect to the period of *lis mota*.—Before the *Berkeley Peerage Case (e)* it was supposed that reputation would be evidence unless there was a suit or dispute actually subsisting at the time: but that case and subsequent cases, and particularly *Walker v. Lady Beauchamp (f)*, have decided that evidence of declarations is not admissible if they were made after the existence of that state of circumstances which gives rise to the controversy or dispute afterwards. The consequence is that, in this case, all the evidence of reputation that arose subsequent to the death of *Edward Moreton* (which was the case with the whole of the evidence to which we have objected), ought to have been rejected at the trial. It must be borne in mind

(d) 2 Bing. 86.

(e) 4 Camp. N. P. C. 401.

(f) 6 Carr. & Payne, 552.

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too that the mortgage which is now vested in the Defendant, was made immediately after *Edward Moreton's* death, and that it then became incumbent on every person who had an interest in the estate, however remote, to redeem the mortgage.

The *Attorney-general*, Mr. *Knight*, Mr. *Maul*, Mr. *Temple*, Mr. *Duckworth* and Mr. *Whateley* for the Plaintiff:

There can be no doubt that the inscription, if it were now in existence, would be admissible in evidence. The evidence that a party may give as to his pedigree, is not confined to what he knows of his own knowledge; but extends to what he has learned from the deceased members of his family (*g*). *Zouch v. Waters* (*h*). If it could be proved that *Edward Moreton* had narrated the facts which this inscription records, that narrative would be receivable. The *Moreton* family resided and had property in the parish of *Shiffnal*. If a pedigree hung up in a hall, or a will kept in a drawer, is evidence, *à fortiori*, this inscription is evidence; for it is a declaration publicly made, and allowed, by the *Moreton* family, to remain unaltered; so that they recognised it as true.

Then we have to consider whether we have given sufficient evidence of the contents of this inscription. *Ames*, in the first part of his deposition, swears to the words and figures of the inscription, and then he authenticates a copy of it; which was superfluous. The authenticity of *Adams's* copy, was no more destroyed by its being inked over, than if it had been made, originally, in ink, which had become faint from age, and then the

(*g*) 2 Stark. Evid. 611.

(*h*) 12 Vin. Ab. 244, pl. 5.

paper had been washed over with some liquid, in order to restore the colour of the ink. *Adams* swears that his pencil marks are still visible in many parts of the register copy, and that the letters, though they have been inked over, bear the character of his handwriting, and he does not hesitate to swear that the document in question, is a true copy of the inscription. Having proved that copy, it was not necessary for us to prove the others. *Morrey's* copy was made before the death of *Edward Moreton*; for *Morrey* died in 1775: and it was produced from the custody of the *Slaneys*, who are related to the *Moreton* family: and, besides, there is an indorsement upon it, made by Mr. *Moreton Aglionby Slaney*, by which he authenticates it. The other copy is that which was made by *Moreton Aglionby Slaney*, and was found amongst his papers. It was made in 1796, which was several years before the death of *Robert Jones Moreton*; and, therefore, that copy, likewise, was receivable in evidence.

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The next point is the legitimacy of *Robert Moreton*, the lunatic.—*Robert Jones Moreton*, in his will, mentions the lunatic as his relation. Next we produce the will of *Elizabeth Moreton*, in which she speaks of *Robert Moreton* as her son: and then we give in evidence the register of the baptism of *Richard Moreton*, in which he is described as the son of his father; which would not have been the case if he had been illegitimate: and we produce also the register of the burial of the same *Richard Moreton*, which shows that *Elizabeth* had a husband named *Slaney Moreton*. Upon this part of the case, therefore, we had sufficient evidence without the deed of 1797; because it lies on the party who would bastardize any particular individual, to prove his illegitimacy.

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As Mrs. *Stanton* was not related to the family, the deed was not admissible as a declaration, nor was it tendered as such: but it was given in evidence as an act done by Mrs. *Stanton*, who was deeply interested not to part with the legal estate except to the person entitled to it. Where a person is recognised, by any act done, as the individual that he is said to be, that act may be given in evidence to prove his pedigree. If the deed had come out of the custody of the lunatic or his representative, it would have been receivable as a declaration. It did not, it is true, come out of the custody of either; but out of the custody of Mr. *Frere*, who holds the property under an assignment from the representative. Then, is not that exactly the same as if the lunatic had executed the deed and thereby adopted and authenticated all the recitals contained in it?

The interpretation anciently put upon the expression *lis mota*, was that it meant a suit actually existing. But that interpretation was afterwards enlarged, and the term applied to a dispute with a view to a suit: and it has been, since, still further extended by Mr. Baron *Alderson*, in *Walker v. Lady Beauchamp*, where his Lordship carried it to this extent: that if, at the time when the declaration was made, the proceeding in which it was tendered could have been instituted by the party or by any one claiming under him, it was inadmissible. The rule as so laid down, makes admissible all declarations made prior to the death of *Robert Jones Moreton*, the last tenant for life.—[The Vice-Chancellor: The question seems to be whether the death of *Edward Moreton*, did immediately create the necessity for some person to assert that he was the heir.]—The question now at issue is not who was the heir of *Edward Moreton* at his death; but who was his

heir at the death of *Robert Jones Moreton* or *Robert Moreton*, the lunatic. It is identical with the question, who is the heir of a person who died seised in fee a century ago. *Doe v. Tarver* (j).

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The VICE-CHANCELLOR:

In this case of *Slaney v. Wade*, a motion has been made for a new trial, and several objections have been taken to the mode of proceeding at the trial. The first object of the Plaintiff in the issues, was to establish in evidence the contents of a mural inscription, which had existed in that part of the church at *Shiffnal* which went by the name of the *Moreton* chancel. There was evidence in the cause which completely established a connection between the *Moreton* family and the parish of *Shiffnal*, and the evidence offered to prove the contents of the mural inscription, which had been defaced, consisted of four papers: one of them was proved to be in the handwriting of a person named *Morrey*, who died in August 1775. There was no evidence to show that that paper which professed, upon the face of it, to be a copy of the mural inscription, was a true copy: and it was said that it ought not to have been received in evidence: and it was also said that, if anything had been received in evidence which ought not to have been received, *that* alone would constitute a ground for a new trial. But I have always understood it to be the doctrine of this Court that, where an application is made, to the Judge who has directed an issue, for a new trial, it is the duty of the Judge to look at all the evidence, and if, without regarding a particular document or fact which may have been given in evidence, there is enough, upon the whole, to satisfy him that a right conclusion has been come to, it is not a reason for directing

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(j) Ryan & Mood, 141.

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a new trial because some portion of the evidence tendered either has been rejected when it ought to have been received, or has been received when it ought to have been rejected. The doctrine is laid down by Lord Eldon in the case of *The Warden of St. Paul's v. Morris* (k), in the case of *Bootle v. Blundell* (l), and also in a case of *Barker v. Ray* (m). It should be observed that, in the case of *The Warden of St. Paul's v. Morris* and in *Barker v. Ray*, the proposition is put, by Lord Eldon, with reference to the rejection of a piece of evidence; but the proposition with respect both to the rejection of what ought to have been received and the reception of what ought to have been rejected, is put, by Lord Eldon, in the case of *Barker v. Ray*: and I must say that, having paid much attention to this subject at various times, I take that doctrine to be firmly settled; so that, even if this paper which has been objected to, namely *Morrey's* copy, had been improperly received, my opinion is that that alone would not furnish a ground for a new trial. The same observation also applies to that document which I may call the *Slaney* copy. But it strikes me that there is one mode of viewing this case in which one is brought to the conclusion that *Morrey's* copy was properly received: because, though it might not be receivable as evidence of what the contents of the mural inscription were, yet it is a paper which was thought of value by the family and preserved by them, because it purported to be a paper that represented the genealogy of the family: and therefore I should adopt it and think it properly receivable on the ground expressed, by Lord Ellenborough, in giving judgment in the case of *Jokson v. Lord Pembroke*. The same observation also applies, though I

(k) 9 Ves. 155. (l) 19 Ves. 494. (m) 2 Russ. 63.

think with less force, to the *Slaney* paper. But, with respect to the *Slaney* paper, there is this evidence, that it has an indorsement on it in the handwriting of Mr. *Moreton Aglionby Slaney*, who is proved to have been a relation of the family by the very document under which the Defendant claims: and that indorsement, though no proof of the fact which it represents, yet affords this inference, namely, that he thought it a paper of value and worth preservation.

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The direct evidence of the contents of the mural inscription, depends upon the evidence which was given by *Adams*, who was examined at the trial, and the deposition of *Ames*, who was examined in the cause in this Court, but died before the trial. Now the evidence of those two persons amounts to this: that, in the year 1810, at a time when it was intended that there should be some repairs and alterations in *Shiffnal* church, they were directed, by Mr. *Hine* the vicar, to take a copy of this mural inscription; and the copy was made by *Ames* dictating to *Adams* and *Adams* writing down, in pencil, on a paper which has been produced before me, what *Ames* so dictated; and that *Adams* afterwards compared what he had written with what was upon the wall of the chancel. There is this singular circumstance connected with this part of the evidence, namely, that the document, having been written in pencil, is produced in a state, certainly not its original state; because all the characters in pencil, not all the pencil marks, but all the words and letters, are covered over, but not entirely, with ink: and I think it is almost impossible to look at the writing in which it appears to be, and to attend to the evidence, without conjecturing at least that the writing in ink was made, by Mr. *Hine* the vicar, at or about the time when the document in pencil

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was produced to him.* It struck me, when I saw the document yesterday, that, though the form and character of the writing in ink, is sworn to, by *Adams*, as resembling his own, yet that there was a certain degree of similarity in it to the handwriting of *Mr. Hine*, so much so that, when I first saw it, I could not but feel an impression that *Mr. Hine*, at the time when the paper was produced to him or just afterwards, performed that operation which I call smearing the paper with ink. This paper was signed by *Mr. Hine* and by *Ames* the clerk soon after it was made; and I wished to see it for the purpose of ascertaining whether any vestiges of writing in pencil remained: and I found, on both sides of the paper, some ends of letters, flourishes and so on which still remain in pencil; so that the substantial part of each letter and not the whole, was covered with the ink: and I have not the slightest doubt, attending to the evidence that was given, that this paper does truly represent the contents of the mural inscription.

An objection was made to the production of that document which was called *Ames's* copy: but, in the first place, that objection is answered by referring to the order which directed the issue; because that order directed that the depositions of witnesses examined in the cause, who should die before the trial or be unable to attend, should be read at the trial; and part of *Ames's* deposition was that very copy which he made, that is, a copy of the copy that was annexed to the parish register. That, however, is a mere technical answer to the objection, and I should be sorry to place

* There was no evidence to show by whom or at what time the letters were inked over.

much reliance upon it. A more satisfactory answer is that, when the authenticity of the register copy is drawn into doubt, it is something to be able to show what were the contents of that copy at a certain time after it was made and before it was brought before the jury; and then we have the evidence of this deceased witness that he, himself, did make that paper which he produces and which he swears to be an exact copy of the register copy. In my opinion therefore sufficient evidence was offered before the Jury of the contents of the mural inscription.

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But then it was said that the mural inscription itself ought not to have been received in evidence.—Now I cannot understand how a mural inscription which contains a recital, made at one time, of a variety of births, marriages and deaths, differs, substantially, from that which unquestionably is receivable in evidence, namely, a pedigree preserved by the family. For a pedigree is not a single statement of the death of one ancestor, but it is a collection and representation, made simultaneously, of a succession of deaths, marriages and births, all going to prove the family genealogy. When the case was argued upon that point, I could not help recurring to what had taken place in the *Troutbeck Case* (n). There a paper containing a history of a family which had been drawn up by a member of the family, when on board ship on his return from *India*, was tendered in evidence; and, when the case was before me, I did not think it necessary to express any opinion upon either the reception or rejection of the paper: yet, when the matter came before Lord Chancellor *Brougham* on appeal, he consulted some of the learned judges on the point, and decided that that paper ought to be received

(n) *Monkton v. Att.-Gen.* 2 Russ. & Myl. 147.

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in evidence. The present Lord Chief Justice of the King's Bench was Attorney-General at that time, and went down, for the Crown, to defend the issue at the assizes: and his Lordship has informed me that the paper was admitted as part of the claimant's evidence; and the result was that, merely upon the weakness of the claimant's own case, (and which, when it was before me, I thought did not sustain his claim) the jury, without hearing any evidence for the Crown, found a verdict for the Crown. That case, therefore, is an express authority in favour of the reception of this mural inscription. Now every one must have observed that, in many instances, inscriptions on tomb-stones contain not only the simple statement of the death of the party and what his age was, but mention also who his father, grandfather and other relations were, and also other particulars, with respect to which one must call to mind what Lord Eldon said in the case of *Whitelocke v. Baker*, namely, that such inscriptions are receivable in evidence, although they often contain many things which are not admissible. For instance, it is not material to a pedigree that a man died at a particular place; but the facts that he did die, who was his father and what children he had, are receivable in evidence. I think, therefore, that, from the necessity of the case and by the analogy of pedigrees and from what was done in the *Troutbeck* Case, the mural inscription itself was evidence.

The next piece of evidence that was the subject of objection, was a deed dated in 1797. That deed was produced under these circumstances.—It was necessary for the Plaintiff, in deducing his pedigree through *Robert Moreton* the lunatic, to make out that a certain woman of the name of *Elizabeth*, had married *Slaney Moreton* and had the lunatic for her child. The deed does con-

tain a recital that *Elizabeth* did marry *Slaney Moreton*; and it was said, in the first place, that there was no evidence at all offered of a marriage, so as to justify the production of that instrument. But, with respect to that, it is observable that there was this piece of evidence, namely, the burial certificate of *Richard*, who was described in it as the son of *Slaney and Elizabeth Moreton*: and, unquestionably, that was some evidence that *Slaney Moreton* did marry an *Elizabeth*. It may be weak evidence; and it may be more weak because it is to be taken in connection with the register of the baptism of *Richard*, in which he was described as *Richard* the son of *Slaney Moreton*; and it is singular and not possible for us, at this time, to account for the fact that, when he was buried, his mother's name was mentioned, but, when he was baptized, his mother's name was omitted. However it is clearly some evidence. It was said that the supposition which has been entertained, all along, by the Defendant (and it is a mere supposition for there is no proof of it) is that *Robert Moreton*, the lunatic, was illegitimate. In my opinion, however, those who claim under the will of *Robert Jones Moreton*, are not at liberty to adopt that supposition; because *Robert Jones Moreton*, in his will, has spoken of this very person as his relation: he uses this expression: "during the natural life of my relation *Robert Moreton* of *Bilston* in the County of *Stafford*." Now, when he says he is his relation, what is the *primâ facie* import of the word, but that he is his legitimate relation. I admit that evidence might have been given to show that that word was improperly used to a certain extent; but the *primâ facie* import of it, and the inference which the jury were justified in drawing, and which I think any judge would be bound to draw, is that the party described as a relation, was a legitimate relation, which, of itself, excludes the supposition that

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his mother was not married to his father ; and, therefore, that is a circumstance which goes to corroborate the inference that is drawn from the burial register of his elder brother *Richard*.

Then, that being the case, the deed was produced, and it was said that it ought not to have been received in evidence, it being a mere declaration, and that, as it was dated in 1797, it was made *post litem motam*. It was said that the *lis mota* began upon the death of the Testator in 1776. The Testator, by his will, devised the estates in question to three different persons and their sons, in succession, in strict settlement. The last of the tenants for life was *Robert Jones Moreton*, who was in possession in the year 1797, and died in the year 1801. Now though I admit the correctness of what Mr. Baron Alderson is reported to have said, in the case of *Walker v. Lady Beauchamp*, as applied to that case, where, upon the death of *Jennings*, the question directly arose ; yet I do not admit that it at all applies to this case, where the question is whether this deed should have been received in evidence. I do not wish to enter into the question (which I think must, hereafter, be decided with more accuracy than it has hitherto been) as to what is really *lis mota* : but my opinion is that this deed cannot be considered as a declaration of that kind to which the doctrine of *lis mota* is applied : for that doctrine is applied to what casually falls from an ancient member of a family, in his ordinary intercourse with the other members of it. It was said that the recitals in this deed, must be taken as the declarations of Mrs. *Stanton* the party conveying. But that is not so : for the transaction was this : a person named *Brandwood*, having a leasehold estate in *Birmingham*, bequeaths it to certain persons in Trust for his daughter *Elizabeth* for life,

and, after her death, among her children as she shall appoint, and, in default of appointment, to the children, and if no children then over. After the Testator's death, his daughter, according to the obvious inference from her will, being in possession of the estate, professes to dispose of it. But as her will was not attested in the manner prescribed by her father's will, it was inoperative to pass the property, and the limitation in default of appointment, in her father's will, took effect. Then it may be inferred that, *Robert Moreton*, being a lunatic, and those persons who were interested in his personal estate, being desirous that the title to the leasehold, which belonged to him and which they or some of them would, probably, be entitled to after his death, should be perfected, apply to Mrs. *Stanton*, the executrix of the surviving Trustee of the father's will, for an assignment of the legal estate. I assume (for it is consistent with common experience) that the proposal to convey the legal estate, came, not from Mrs. *Stanton*, the Trustee, but from the persons who were *quasi* the next of kin to the lunatic. And I next infer that, if any representations were made to Mrs. *Stanton* upon the footing of which she was required to assign the legal estate, she, who was two steps removed from a knowledge of the facts, would make inquiries whether the representations were true; and it is observable that there is no method of making out that she was bound to convey the legal estate in the way in which she does convey it, except by going to the fountain head of the title and showing that *Elizabeth Moreton* did marry a given individual, and had the lunatic for her son. It is not the declaration of Mrs. *Stanton*, and it is not merely a declaration made by anybody but it is an act done combined with representations made for the purpose of having that done which the

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parties, if they correctly represented the facts, had a right to have done, and which Mrs. *Stanton* was compellable to do. It is a case in which representations were made on one side, and must have been examined and sifted on the other; and in which, after the representations had been made and had been examined and found to be correct, an act was done consistent with those representations. It was one of the most important acts regarding family property that could be performed. The deed too comes out of the proper custody, because the personal representatives of the son, were the parties who conveyed the property to Mr. *Fryer* in 1815, and ever since that time he has been in possession of it. In my opinion, therefore, this deed must be considered, not as evidence of that description to which the doctrine of *lis mota* is applicable, but as evidence of a solemn transaction, preceded by examination and proof, and that it was properly received in evidence for the purpose for which it was tendered.

Upon the whole of the case, my opinion is that the Plaintiff has clearly and substantially made out the facts which he had to prove, and, consequently, that no new trial ought to be granted: and I also think that, as the objections which have been now made to the evidence, are the same as were over-ruled at the trial, the Defendant ought to pay the costs of the motion.*

*New Trial.
Evidence.*

In moving for a new trial of an issue, either party may refer to evidence given in the cause, though it was not used at the trial.

IN the course of the argument in the above case, the Plaintiff's counsel referred to a deed which, though it had been produced in the proceedings in Chancery, had

* Affirmed by the Lord Chancellor. See 1 Myl. & Craig, 338.

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not been produced at the trial of the issues. The Defendant's Counsel contended that, as the deed had not been used at the trial, it ought not to be used on the motion.

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The *Vice-Chancellor* said that, when an application for a new trial was made to a judge of a court of equity, he had to consider whether, upon the whole of the evidence laid before him, including that which was before him at the time when the issue was directed, as well as that which was given at the trial of the issue, a fair ground was made for directing a new trial: and that the Court always looked at the evidence given at the trial of the issue, as part of the evidence in the cause.

BRACE v. BLICK.

IN this case The *Vice-Chancellor* ruled that, where a power was required to be exercised by a deed executed in the presence of and attested by witnesses, the deed by which the power was exercised, could not be proved, *vivâ voce*, at the hearing of the cause.

1836:
12th Jan.

Practice.
Proof at
Hearing.

1836:
23th January.

*Settlement.
Construction.*

Property agreed to be settled, consisted of leaseholds in possession, and of money to be received on the husband's death, which was to be invested in the usual securities, and the Trustees were to stand possessed of the leaseholds in Trust for the husband for life, and, after his death, of one moiety of the leaseholds, stocks, funds and securities, for the wife for life, in case she survived her husband, and of the other moiety of the leaseholds, stocks, funds and securities after the husband's

death, and of the whole of the stocks, funds and securities, after the wife's death, in Trust for the children. The wife died in the husband's lifetime. Held that there was a resulting Trust, as to the leaseholds, for the husband, the settlor.

WILSON v. PAUL.

BY the settlement on the marriage of the Testator in the cause, after reciting a policy of insurance on the Testator's life for 5,000 *l.*, and an indenture dated the 15th of May 1824, by which a messuage in *Holborn* was demised to the Testator for 21 years from the 29th of September then next, at the yearly rent of 320 *l.*; and also reciting the intended marriage, and that it had been agreed that the policy and the leasehold premises should be conveyed to *R. Goodman* and *P. Paul* upon the trusts thereafter expressed concerning the same: it was witnessed that, in pursuance of the agreement and in consideration of the intended marriage, and for making a provision for the intended wife, the Testator assigned the policy and all sums recoverable thereon, to the Trustees, upon the Trusts thereafter expressed. And it was further witnessed that, for the considerations aforesaid, the Testator assigned the premises comprised in the lease, to the same Trustees, upon and for the Trusts and purposes thereafter expressed concerning the same. And it was declared that the Trustees should be possessed of the policy and the monies thereby assured, and also of the leasehold premises, in Trust, after the marriage, to authorise the Testator to enjoy all the benefit of the leasehold premises for his life, and, after his death, to invest the money to be received under the policy, in the purchase of Govern-

ment stocks, or upon real securities, and to stand possessed of the said *stocks, funds and securities*, and also of the said *leasehold premises* after the Testator's decease, upon Trust, as to one moiety of the said *leasehold premises, stocks, funds and securities*, to pay the rents and profits, interest, dividends and annual proceeds thereof to the intended wife, in case she should survive the Testator, for her life, if she should so long continue a widow; and, as to the other moiety of the said *leasehold premises, stocks, funds and securities*, during the life and widowhood of the intended wife, and, after her death or marriage, whichever should first happen, then, as to the whole of the said *stocks, funds and securities*, in Trust for such of the Testator's children by his then intended or any former wife, to be *vested and payable* at such times and in such shares, and subject to such provisions, conditions, or limitations over, and charged with such annual sums or sums in gross for the benefit of some or one of the said children, as the Testator should appoint; and, in default of appointment, in Trust for all his children who, being sons, should attain 21, or, being daughters, should attain that age or marry: and upon Trust, after the Testator's decease, and during the minority of any of his sons, or the minority or discovery of any of his daughters, to apply the dividends, interest, and yearly proceeds of their presumptive portions, for their maintenance; and to apply any part of each son's presumptive portion (not exceeding 200 l.) for his advancement. And the Testator covenanted to keep the policy on foot, and to do all necessary acts for further assigning the policy *and other the premises* to the Trustees: and the settlement contained clauses for the appointment of new Trustees

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of *the Trust premises*, and for the reimbursement and indemnity of the Trustees.

The Testator's wife died in his lifetime. The Testator left several children who were still living.

The Plaintiffs were creditors of the Testator. The Defendants were his executors and also the Trustees of the settlement. They presented a petition in the cause, alleging that no trust of the leasehold premises was declared by the settlement, after the death of the wife in the lifetime of the Testator, and that they were advised that there was a resulting Trust of those premises for the Testator's estate, and that his general assets were liable to the payment of the rent and performance of the covenants contained in the lease.

Mr. *Jacob* and Mr. *Willcock*, in support of the Petition.

The Trusts declared of the leaseholds, do not extend to the children. In the prior part of the settlement, the words used, are "leasehold premises, stocks, funds and securities;" but, in declaring the Trusts for the children, the words "leasehold premises" are omitted. The words "vested and payable," are not applicable to leaseholds; and the settlement contains no leasing power. You must either insert or strike out words, in order to give the children an interest in the leasehold estate.

Mr. *Knight* and Mr. *Alexander*, for the Plaintiffs.

The construction of this settlement does not admit of any reasonable doubt: it is merely a case of defective enumeration. The settlement recites the policy and the lease, and that it had been agreed that both the policy

and the premises comprised in the lease, should be conveyed to the Trustees upon the Trusts thereafter expressed concerning the same. The policy is assigned separately from the lease, because the latter was an interest in possession; but nothing could be received under the policy, until the death of the husband. The Trustees are then directed to stand possessed of the leaseholds and of the policy upon the Trusts that follow: and, then they are directed to stand possessed of one moiety of the leasehold premises, stocks, funds and securities, for the wife during her widowhood, and of the other moiety of the said leasehold premises, stocks, funds and securities during the same period, and *of the whole* of the said stocks, funds and securities, after the death or second marriage of the wife, for the children of the settlor. That expression "the whole," means the whole of that which, before, was to be divided into moieties. If we look at the power to appoint new Trustees, we shall find that it imports an indivisible Trust; for, in speaking of the property comprised in the settlement, it uses the words "Trust premises." There is nothing, therefore, in the settlement that restricts the Trusts in favour of the children, to the securities in which the proceeds of the policy were to be invested.

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The VICE CHANCELLOR :

A perfect construction can be put upon the language of this settlement; and it is only conjecture that interferes with its being taken as it stands. Where an instrument, if construed as it is expressed, affords a clear meaning and there is no inconsistency in any part of it, the Court is not at liberty to supply words or in any way to alter, on conjecture, what is clearly expressed: but, where the words of an instrument militate with

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each other, it is allowable to make a selection in order to render the whole consistent.

Taking then the words of this instrument as they stand, I am of opinion that, in the event that happened, there was a resulting Trust, as to the leaseholds, for the settlor; and, consequently, the arrears of rent must be paid out of the fund in Court which is part of his general personal estate (a).

1836:

14th January.

Practice.
Jurisdiction.
Steward of a
Manor.

The steward of a manor who was also a solicitor; ordered, on the petition of the Lord, in a summary manner, to deliver up the court rolls to the Receiver in the cause.

RAWES v. RAWES.

THE Plaintiffs were, under the will of *John Woodward*, their grandfather, seised in fee, as tenants in common, of certain manors and other real estates in *Norfolk*. One *Charrington*, an attorney and solicitor, had been employed, by the Testator, as steward of the manors, and continued to hold that office after the Testator's death.

The Plaintiffs presented a petition (which was intitled both in the Cause and in the Matter of *Charrington*) alleging that *Charrington* had been guilty of negligence in collecting the fines and quit rents of the manors, and in performing the other duties of his office; that he had been a bankrupt, and had been confined in *Norwich* gaol, at the suit of the Crown, for non-payment of legacy-duty; and praying that he might be ordered to deliver, to the receiver in the cause, all the court-rolls and other documents relating to the manors, which were in his possession.

(a) See *Langham v. Nenny*, 3 Ves. 467.

Mr. *Knight* and Mr. *Walker*, for the Petitioners, said that the court rolls of a manor belonged to the lord, and that he was entitled to the custody of them (a): and, in order to show that the Court had jurisdiction to order them to be delivered up on petition, they cited *Hughes v. Mayre* (b) and *Ex parte Grubb* (c).

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Mr. *Lovat*, for *Charrington*:

The duty of the receiver is merely to receive the rents: neither he nor the lord is entitled to the custody of the court-rolls. In every manor there are two courts: the court of the freeholders and the customary court. The steward is the judge of the customary court, and he is also the depositary of the rolls for the freeholders: *Holroyd v. Breare* (d). The tenants of the manor are as much interested in the court-rolls as the lord is: they are, in fact, the title-deeds of the copyholders; and, if they are taken out of the custody of the steward and delivered to the lord, the lord may destroy them or alter the fines to the prejudice of the copyholders. In *Hughes v. Mayre*, the grounds on which the steward refused to deliver up the documents, were, merely, that he had a demand upon Sir *Richard Hughes*, and that another person had a claim upon some part of the estates, and he had not received any authority from that person to deliver up the muniments to Sir *Richard Hughes*. That case applies only to the jurisdiction of the Court of King's Bench over attornies of the Court. The case in *Strange* (e), on which Lord *Kenyon* relied, related to title-deeds only, and not to court-rolls. In *Ex parte Grubb* no cause was shown against the rule being made absolute; and the applica-

(a) Sugd. Vend. 8th ed. 240.

(d) 2 Barn. & Ald. 473.

(b) 3 T. R. 275.

(e) Strong v. Howe, 1

(c) 5 Taunt. 206.

Stra. 621.

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tion was that the court-rolls might be delivered to the lord *or to his steward*.

The VICE-CHANCELLOR :

Nothing, in the nature of decision, has been cited to me to show that the right to hold the court-rolls is in the steward as against the lord. In the cases referred to in support of the petition, the only doubt that the Judges entertained, was whether they had jurisdiction to order, in a summary way, an attorney to deliver deeds to his client: and, finding that they had that jurisdiction, they take it for granted that they had authority to compel the steward, as an attorney, to deliver up the court-rolls to the lord.

The lord has, as of right, the custody of the court-rolls; and though they ordinarily remain in the custody of the steward, he holds them only as servant or agent to the lord.

I shall, therefore, make an order according to the prayer of the petition.

THRELFALL v. LUNT.

THE Defendant had brought an action against the Plaintiff on a bill of exchange, and had recovered and been paid the amount of it, but had not delivered it up to the Plaintiff. The Bill in the above cause was then filed, praying (amongst other things) that the Defendant might be decreed to deliver up the bill of exchange to the Plaintiff. The Defendant put in a general demurrer.

1836.
20th January.

*Demurrer.
Bill of
Exchange.*

Demurrer allowed to a bill for the delivery up of a bill of exchange, the amount of which the Defendant had recovered at law and had received from the Plaintiff.

Mr. *Jacob* and Mr. *Dixon*, in support of the Bill, said that, if the Plaintiff was not entitled to any other part of the relief, he was, at all events, entitled to have the bill of exchange delivered up to him; and, therefore, that part of the prayer was sufficient to support the bill: that the Defendant, if he retained possession of the bill of exchange, might bring another action upon it against the Plaintiff, and put him to prove that the bill on which the action was brought, was the same as that referred to in the judgment at law: and that there was no process at law or other means, except a bill in equity, by which a party who had paid a bill of exchange, could get possession of it.

Mr. *Knight* and Mr. *L. Lowndes*, for the Plaintiff.

The *Vice-Chancellor* said that he never remembered any instance of a bill being filed, to have a bond or bill of exchange delivered up, after an action had been brought and judgment recovered on it at law.

Demurrer allowed.

1836 :
20th January.

Will.
Construction.
Contingent
Remainder.

Testator devised a freehold estate to his wife for her widowhood, remainder to his nephew for life, remainder to the children of his nephew in fee as tenants in common, and, if there should be no child of his nephew living at his wife's death or second marriage, then over; and, by a codicil of even date with the will, he directed that neither his nephew nor any issue of his nephew should take a vested interest by virtue of his will, unless they should respectively attain 21; and that, in case of the death of any of such children under 21, their shares should go to the survivors, on their attaining 21. The nephew attained 21, and had five infant children living at the widow's death. Held that their interests were contingent on their attaining 21.

RUSSEL v. BUCHANAN.

ROBERT BROWN, Esq., by his will dated the 12th of March 1814, devised all his capital and other messuages, lands, tenements, and hereditaments at *Streatham* in *Surrey*, to his wife, *Susanna Brown*, for her life or until she married again; and, after her decease or marrying again, to his nephew, *Robert Brown Russel*, for life; and, after the decease of his nephew, to the children of his nephew, their heirs and assigns, as tenants in common; but in case there should be no child of his nephew living at the decease or marrying again of his wife, then he devised the premises at *Streatham*, unto his executors, in trust and for the separate use of his niece, *Mary Russel*, exclusive of any husband she might happen to marry; and, after her decease, in trust for her children, their heirs and assigns, as tenants in common; and, in case of the respective deceases of *R. B. Russel* and *Mary Russel* without leaving any child who should be living at the decease or marrying again of his wife, then he devised the premises at *Streatham*, to *Robert Coster*, *John Coster*, and *Mary Ann Squarrey*, the children of *Robert Coster* and *Hannah Coster*, their heirs and assigns, as tenants in common. And he gave the residue of his estate and effects, of what nature or kind soever, after the decease

or marrying again of his wife, to *Robert Brown Russel* and *Mary Russel*, share and share alike, with divers gifts over, upon certain events which did not happen, for the benefit of the children of *Robert Brown Russel* and *Mary Russel*, and of *Robert Coster*, *John Coster*, and *Mary Ann Squarrey*.

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The testator, on the same 12th of March 1814, made a codicil in the following words :

“ This is a codicil to my foregoing will. It is my will and mind, and *I do hereby direct that neither the said Robert Brown Russel, nor Mary Russel, nor any or either of their issue respectively, nor the said Robert Coster, John Coster, or Mary Ann Squarrey, nor any or either of their issue respectively, shall, by virtue of this my will, take or be considered as entitled to a vested interest or interests, unless and until they shall respectively attain the age of 21 years*; and in case of the death of any one or more of such children under such age, then the share of such child or children so dying, shall go to the surviving brothers and sisters, or brother or sister, as the case may be, of such child or children so dying, their, his, or her heirs and assigns respectively, upon their respectively attaining the age of 21 years.”

The Testator died shortly after the date of his will, leaving his wife, and *Robert William Brown*, his only son and heir-at-law, and *Robert Brown Russel* and *Mary Russel*, surviving. The Testator was not seised of any real estates except the premises at *Streatham* and certain other hereditaments which were specifically disposed of by his will. His widow did not marry again. *Robert William Brown* died in her lifetime without

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issue and intestate, leaving *Robert Brown Russel*, his cousin and heir, who thereupon became the heir of the Testator. The Testator's widow died in September 1829. *Robert Brown Russel*, in her life-time, attained 21, married and had issue five daughters, who were Defendants in the Cause.

Robert Brown Russel, by his will dated the 13th of April 1832, gave all his freehold and copyhold estates and all the residue of his personal estate, to his wife, the Plaintiff, *Elizabeth Sheriff Russel*, and to the Defendants, *Robertson Buchanan* and *Nathaniel Nicholls*, their heirs, executors and administrators, upon certain Trusts therein mentioned. *Robert Brown Russel* died on the 26th of April 1832, leaving his five daughters (all of whom were infants) his co-heirs.

At the hearing of the cause, The *Vice-Chancellor* directed a case to be made for the opinion of the Barons of the Court of Exchequer upon the following questions:

First: Whether *Robert Brown Russel* took any and what interest in the premises at *Streatham* or in the rents and profits thereof, under the will and codicil of *Robert Brown*, or as the heir of *Robert William Brown*, or as the heir of *Robert Brown*.

Secondly: Whether the infant Defendants took any and what interest in the same premises or in the rents and profits thereof, under the will and codicil of *Robert Brown*, or as the heiresses-at-law of *Robert William Brown* or *Robert Brown Russel*.

Thirdly: Whether *Elizabeth Sheriff Russel*, *R. Buchanan* and *N. Nicholls* took any and what interest

in the same premises or in the rents and profits thereof,
under the will of *Robert Brown Russel*.

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The case having been argued, the following certificate
was returned :

“ This case has been argued before us by counsel :
we have considered it, and are of opinion :

“ In answer to the first question, that *Robert Brown
Russel* took a fee in the property in question as the heir-
at-law of the Testator *Robert Brown*.

“ In answer to the second question, that the
Defendants *Frances Russel, Mary Russel, Elizabeth
Russel, Ellen Russel* and *Jane Russel*, the infants, take
no interest in the property in question, either under
the will and codicil of *Robert Brown*, or as the
heiresses-at-law of *Robert Wm. Brown* or *Robert Brown
Russel*.

“ In answer to the third question, that *Elizabeth
Sheriff Russel, R. Buchanan* and *N. Nicholls* take a fee
in the property in question under the will of *Robert
Brown Russel* (a).

(signed) “ *Lyndhurst.*
“ *W. Bolland.*
“ *J. Vaughan.*
“ *J. Williams.*”

The children of *Robert Brown Russel*, being dissatis-
fied with the certificate, now applied that the opinion
of the Judges of another court of law, might be taken on
the case.

(a) See 2 Crompt. & Mees. 561.

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Mr. *Barber* and Mr. *Rudall*, in support of the application :

It is not disputed that the shares of the children were vested under the will. The codicil bears the same date as the will and the Testator calls it his will ; therefore they must be construed as one instrument. The Testator had made no provision, in his will, for the event of children dying under 21 : his object, in making the codicil, was to supply that omission, by divesting the shares of the children, on their dying under 21. The Barons of the Exchequer considered that the Testator intended to postpone the vesting of the shares, and not (as we contend) to point out the time at which the interests of the children were to become absolute and indefeasible. According to their construction, the survivorship clause would be superfluous ; for, if the shares did not vest in the children until they attained 21, there could be nothing to go over in the event of the children dying under 21. *Wadley v. North (b)*. The observations of The *Master of the Rolls*, in that case, apply most strongly to this. The word ‘vested,’ is frequently used to mean, “until interests which are, in fact, vested, become indefeasible.”—We submit that the children took vested interests, subject to be divested on their dying under 21. *Montgomerie v. Woodley (c)*, *Bromfield v. Crowder (d)*, *Doe v. Moore (e)*, *Phipps v. Williams (f)*.

THE VICE-CHANCELLOR :

The rule in construing instruments, is to give to the words their natural, legal import, although, thereby, other words may be rendered useless.

(b) 3 Ves. 364.

(c) 5 Ves. 522.

(d) 1 New Rep. 313.

(e) 14 East, 601.

(f) *Ante*, Vol. 5, p. 44—

The decision was reversed in the House of Lords. See 9 Bli. N. S. 430.

The primary intention of the Testator, in making this supplement to his will, was that none of the children should take except in the event of their attaining 21 : and then, I admit, it was superfluous to say: "and in case of the death of any one or more of such children under such age, then the share of such child or children so dying shall go to the surviving brothers and sisters or brother or sister, as the case may be, of such child or children so dying." He however ends the sentence in these words: "upon their respectively attaining the age of 21 years." Therefore he concludes with words which manifest his intention to be the same at the end as at the beginning of the instrument: and, as he had said that none of the devisees, nor any of their issue should take vested interests unless and until they attained 21, my opinion is that the interests of the children were contingent on their attaining that age, and, consequently, that the certificate is right.

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1836 :
30th January.

*Bonus.
Tenant for
Life and
Remainder-
man.*

By a marriage settlement some shares in The London Assurance Company, were settled on the husband and wife for their lives, and after their deaths, on their children; and it was provided that, if any bonus should be given by way of increase of capital of the Trust-funds, it should be added to the capital: but, if it should be given by way of interest or dividend, it should be paid

to the person entitled to receive the dividends of the Trust-funds for the time being. At a meeting of the Company, the usual dividend of 1*l.* per share was voted; and it was resolved that a certain sum should be taken out of the profits of the Company and divided amongst the proprietors in proportion to their shares. Held that the addition made in pursuance of the resolution, was to be considered as part of the capital of the Trust-fund.

WARD v. COMBE.

BY Mr. and Mrs. *Ward's* marriage settlement, 167 shares in The London Assurance Company, which had been purchased with money advanced by Mr. *Ward's* father, were settled on Mrs. *Ward* for life, and, after her death, on Mr. *Ward* for life, and, after the death of the survivor, on the children of the marriage: and it was provided that, in case any bonus, addition or increase should be given or made *by way of increase of capital of the stock* wherein the Trust-money or funds, or any part thereof, was or should be invested, the same should be added to and form part of the capital of the Trust-stock; but, in case the same should be given by way of interest or dividend, the same should be paid to the person or persons entitled to receive the dividend thereof for the time being.

The Company had been, for many years, in the habit of reserving some part of their profits, whereby a large accumulation had been made. At a court held on the 25th of October 1835, the ordinary dividend of 1*l.* per share was voted; and, it was resolved that a sum of 430,344*l.*, being at the rate of 12*l.* per share, should be taken out of the profits of the Company, and divided

amongst the proprietors in proportion to their shares. On the 7th of October 1835, the Secretary to the company wrote a circular letter to the proprietors, which, after setting forth the resolution, proceeded thus: "I am also desired to inform you that warrants will be ready for the payment of the 12*l.* per share on Wednesday the 14th inst. I am further desired to acquaint you that the corporation are advised that powers of attorney granted to bankers and others for receiving dividends, will not enable the holders thereof to receive the warrants for this distribution; and that, in the case of executors and trustees or joint accounts, the distribution cannot be paid except all the parties attend to sign the warrants, or a power of attorney be granted, which powers are to be obtained at this office."

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The Bill was filed, by the children, against their father and mother and the trustees of the settlement, praying that the distribution of 12*l.* per share might be declared to be a bonus and addition to the capital of the trust-fund.

Mr. and Mrs. *Ward*, in their answer, said that, by the charter of the company, the directors were empowered, as their affairs might require it, to call, from the members, in proportion to their shares in the capital stock, such sums as they should deem necessary; and that it was declared that the money so called and paid in, should be deemed capital stock; but that the directors had not, since the date of the settlement, made any such call: and they submitted that, under the circumstances of the said extraordinary distribution amongst the proprietors, the same ought not to be considered as capital, but as interest or dividend; and that, according to the true intent and meaning of the proviso in the

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settlement, Mrs. *Ward*, being entitled to receive the dividends of the shares, was entitled to receive the amount of the distribution.

The cause now came on to be heard as a short cause.

Mr. *James* for the Plaintiff:

If it were not for the proviso in the settlement, there could be no doubt that the increase of 12 *l.* per share, must be dealt with as capital: *Brander v. Brander* (a), *Irwin v. Hewson* (b), *Paris v. Paris* (c), *Hooper v. Rossiter* (d). The question then is: Does the proviso make any difference? I submit that it does not. The second part of the proviso means nothing more than that, if the ordinary dividends are increased, the tenant for life shall have the benefit. It is clear that the distribution in question, was intended to be a bonus or addition to the capital of the shares, for, otherwise, the company would not have made it the subject of a separate resolution, but would have included both the dividend and the bonus in one and the same resolution, and the circumstance of its not being *ejusdem generis* as the capital, is of no importance. This case falls within the principle of *Paris v. Paris*.

Mr. *Knight* and Mr. *Fisher* for Mr. and Mrs. *Ward*:

The thing to be divided in this case, was profit, not capital, as appears by the resolution. The word *bonus* is not used. Reserved profit does not become capital unless a further act be done, that is, unless it be expressly added to the capital. The proviso in the settlement,

(a) 4 Ves. 800. (b) 10 Ves. 189, cited. (c) 10 Ves. 185.
(d) 13 Price, 774. S. C. McClel. 527.

distinguishes this case from those that have been cited. The company have the power of increasing their capital; and the meaning of the proviso is that, unless the addition is made, expressly, by way of increase of capital, it shall go to the tenant for life. The resolution does not call the increase, "Capital;" but, on the contrary, says that the 430,344*l.* is to be taken *out of the profits* of the company and *divided* among the proprietors.

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Mr. *Addis* appeared for the Trustees.

The VICE-CHANCELLOR :

The sum to be divided in pursuance of the resolution in question, must be considered as part of the capital of the shares.

The proviso in the settlement is that, in case it should happen, at any time thereafter, that any bonus, addition or increase should be given or made by way of increase of the capital of the stock wherein the said trust money or funds, or any part thereof, was or should be invested or laid out, the same bonus, addition or increase should be added to and form part of the capital of the trust stock in respect to which the same should be given or made; but, in case the same should be given by way of interest or dividend, the same should be paid to the person or persons entitled to receive the dividend thereof for the time being.

Now, two resolutions were passed on the same day : one by which the dividend was declared, and the other is that which is now in discussion. The fact that there were two resolutions, shows that the company did

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intend, by the second, something different from the first; otherwise, they would have incorporated both of them in one. There is nothing to show at what time the profits, out of which the sum to be divided was to be taken, arose: they might have been profits that had lain dormant for a series of years.

The cases amount to this: that if the increase is given, by way of dividend, it must be taken as such. But, here, the increase was not given as dividend, but in contradistinction to what was given as dividend: and the consequence is that the 2,004*l.* the amount of the increase of 12*l.* per share on the 167 shares, must be considered as capital and be invested in the manner directed by the settlement.

1836:
 1st February.

Practice.
Affidavits.

The plaintiff applied for a special injunction, *ex parte*, but the Court required him to give notice of the motion. After service of the notice, but before the day mentioned in it arrived, the answer was filed.

On the motion being renewed, affidavits filed with a view to the *ex parte* application, were allowed to be read.

ATKINSON v. KEMBLE.

THE Bill prayed for a special injunction to prevent the defendant from distraining for the arrears of an annuity, and affidavits were filed in support of the allegations in the Bill. On the Plaintiff applying for the injunction, The *Vice Chancellor* required him to give notice of the motion. After the notice had been served, but before the day mentioned in it had arrived, the defendant put in his answer. On the motion being renewed, the defendant's counsel contended that the affidavits filed in support of the Bill, could not be read, and cited *Glassington v. Thwaites (a)*, and *Morphett v. Jones (b)*. The *Vice Chancellor*, overruled the objection, and the affidavits were accordingly read.

(a) 1 Sim. and Stu. 124. (b) 19 Ves. 350.

Mr. *Knight* and Mr. *Dixon*, for the Plaintiff. Mr. *Wigram*, Mr. *Purvis* and Mr. *Heathfield*, for the Defendant.

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REED v. HARRIS.*

THE Bill stated that *John Reed* died intestate on the 31st of December, 1834, leaving the Plaintiff, his only son, his heir at law and sole next of kin; that, after his death, the Defendant, *Alice Harris*, produced to the Ecclesiastical Court, a paper writing dated the 10th of August 1832, purporting to be the will of the deceased, in which she was named as executrix; that the will was obtained by fraud and intimidation, and was afterwards cancelled by the deceased; that the Plaintiff had entered a *caveat* against probate being granted to the defendant, and that a suit for the purpose of ascertaining to whom administration of the deceased's personal estate ought to be granted, was depending in the Ecclesiastical Court; that the Plaintiff had brought an ejectment to recover a part of the deceased's real estate, and had obtained a verdict. The Bill prayed that the personal estate might be secured, and that an account might be taken of what portion had been received by the Defendant; and that a receiver, *pendente lite* in the Ecclesiastical Court, might be appointed.

1836:
6th February.

*Payment of
Money into
Court.
Executor and
Administrator.*

Although the Court will appoint a receiver on account of the pendency of a suit in the Ecclesiastical Court, respecting the validity of a will, it will not, on that account alone, order the person named as executor, to pay, into Court, money in his hands belonging to the deceased's estate.

In November 1835 a receiver was appointed. Afterwards *Alice Harris* put in her answer. It appeared, by the schedule, that she had received, in respect of the personal estate, the sum of 1,315*l.* 17*s.*, of which 1,011*l.* 10*s.* was paid to her by a debtor to the

* *Ex relatione.*

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deceased, for principal and interest due on a bond ; and that she had thereout paid sums amounting to 1,019 *l.* 18 *s.*

The Plaintiff now moved that the Defendant might pay into court the balance of 295 *l.* 9 *s.* It was not alleged that she was insolvent.

Mr. *Knight* and Mr. *Wilson* in support of the motion.

Mr. *Jacob* and Mr. *J. Romilly* for the Defendant.

The principle on which the Court acts in appointing a receiver *pendente lite*, is that, during the suit in the Ecclesiastical Court, there is no personal representative of the testator ; there is no person who is able to obtain payment of any debts due to the testator or to give a good discharge to the debtors, and, consequently, unless a receiver were appointed, the assets of the testator might be wasted. But the Court never goes so far as to make a supposed executor pay, into court, money belonging to the testator's estate previously received. The principal sum in this case, is 1,011 *l.* 10 *s.*, which was paid to the Defendant by a debtor to the estate. If the will is good and she is executrix, there is no pretence for requiring her to pay this money into court ; if the will is bad and she is not executrix, the payment by the debtor will not discharge him, and he will remain liable to the person to whom letters of administration to the deceased may be granted.

The *Vice Chancellor* refused the motion on the grounds stated by the Defendant's counsel, but without costs.

ASHFORD v. CAFE.

1836:
19th February.

Will.
Construction.
Power.

CHARLES HOUSLAMB WALLER, by his will dated the 6th of March 1819, directed his executors to invest his residuary personal estate in government securities, and to pay the dividends thereof to his sister, *Mary Ashford*, for her life, for her separate use, and, after her decease, to stand possessed of the capital upon Trust, in case the Testator's niece, *Sarah Ashford*, should be *then* unmarried, to transfer the same to her, her executors, administrators or assigns; *but in case she should be then married*, upon Trust to transfer the same to such person or persons, &c. as she, notwithstanding her then or any future coverture, *and whether she should be sole or married*, should, by any deed or writing, or by her last will and testament in writing, or any writing in the nature of such last will and testament, appoint: and, in default of such appointment, in Trust to pay the dividends thereof into her proper hands, or to the hands of such persons as she should, from time to time, but not by way of anticipation, appoint, during her life, to the intent that the same might be for her separate use, and might not be subject to the debts, control, disposition or engagements of her then or any future husband: and the Testator directed that, subject to the Trusts aforesaid, the capital should be in

Testator gave a fund to Trustees for his daughter for life, and, after her death, in Trust to transfer it to his niece, her executors, &c. in case she should be then unmarried; but in case she should be then married, in Trust to transfer the same to such persons as she, whether sole or married, should, by deed or will, appoint, and, in default of appointment, in Trust to pay the dividends to her, for her separate use, for life, and, subject to the Trusts afore-

said, the capital to be in Trust for her, her executors, &c. The niece married after the Testator's death; and, during her coverture and in the lifetime of the Testator's daughter, she made a will purporting to be an execution of the power given to her by the Testator. Held that the will was a good exercise of the power.

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Trust for *Sarah Ashford*, her executors, administrators and assigns.

The Testator died in 1822. In 1826 *Sarah Ashford* married *John Aldridge*: and, in 1829 she disposed of the Trust fund in favour of the Plaintiffs, by a will or writing in nature of a will, which purported to be made in exercise of the power given to her by the will of the Testator.

In 1833 *John Aldridge* died. In 1834 *Mary Ashford* died.

The Defendant, *Cafe*, was the surviving executor and trustee of the Testator's will: the other Defendant was the personal representative of *John Aldridge*.

The Bill prayed that *Cafe* might be decreed to transfer the securities in which the Testator's residuary personal estate was invested, to the Plaintiffs *Ashford* and *Briginshaw*, to be held by them upon the Trusts of the will or testamentary appointment of *Sarah Aldridge*.

The question was whether, as Mrs. *Aldridge* died in the lifetime of her mother, Mrs. *Ashford*, the power of appointment given to her by the Testator's will, took effect.

Mr. *Jacob* and Mr. *Rudall*, for the Plaintiffs, said that the power was not contingent on Mrs. *Aldridge* surviving her mother, but that the object of the Testator was to give her an absolute interest in the Trust fund, and, at the same time, to exclude any husband that she might marry from having any control over it.

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Baker v. Hanbury (a), Dalby v. Pullen (b), Pearsall v. Simpson (c), Massey v. Hudson (d).

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Mr. *Koe*, for the personal representative of *John Aldridge*, contended that, as Mrs. *Aldridge* did not survive her mother, the power never arose.

Mr. *Knight* and Mr. *Evans* for the Defendant *Cafe*.

THE VICE-CHANCELLOR :

In my opinion the Testator intended that his niece should be absolutely entitled to the fund, if single, but, if married, that she should have a power of appointment over it. The last words in the will show that a gift to her was intended in all events.

Declare that the Trust fund passed by the will or testamentary appointment of Mrs. *Aldridge*.

(a) 3 Russ. 340.

(c) 15 Ves. 29.

(b) 2 Bing. 144.

(d) 2 Mer. 130.

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20th, 22d and
26th February,
and 7th May.

Secret
Trust.
Fraud.

Testator gave his real and personal estate to his wife, absolutely, "having a perfect confidence she will act up to those views which I have communicated to her, in the ultimate disposal of my property after her decease." After the death of the wife intestate, a Bill was filed by two natural children of the Testator, against his heir and next of kin, and also against his wife's heir and administrator, alleging that the Testator, at the time of making his will, desired his wife to give the whole of his property, after her death, to the Plaintiffs, and that she promised and undertook so to do. Held that, if the Plaintiffs had proved that allegation, a Trust would have been created, as to the whole of the property, in favour of the Plaintiffs.

PODMORE v. GUNNING.*

THE Plaintiffs were *Arthur Podmore* and *Mary* his wife, and *George Podmore* and *Margaret Thomasine* his wife: they claimed to be entitled, under the circumstances after mentioned, to the real estates and the residuary personal estate of the late Sir *Thomas Staines*. The Defendants were *George Gunning*, who had married Sir *Thomas Staines*'s widow, and, on her death, took out administration to her, *William Bridger* and *Christian Tournay* his wife, who was the sister and heir of Lady *Staines*, *William Wye*, the administrator *de bonis non* of Sir *Thomas Staines*, and *George Harris Staines* the brother and heir and also one of the next of kin of Sir *Thomas*, and *Ann Willement* and *Margaret Stewart*, his sisters and other next of kin.

The Bill stated that Sir *Thomas*, previous to and at the time of making his will, was desirous of making some provision for the female Plaintiffs, who were generally understood to be, and were recognized and considered by him and by Lady *Staines* as being his natural daughters; and that Sir *Thomas* had, at the time of making his will, determined to give to

* See a report of a motion for a receiver in this cause, *ante* vol. 5, page 485.

or in Trust for them or for their benefit, after the decease of Lady *Staines*, the residue of his property, of every nature and kind, after payment of his funeral and testamentary expences, debts and legacies; that Sir *Thomas*, previously to and at the time of making his will, communicated to Lady *Staines* such his desire and determination, and that, upon being apprised thereof, *she proposed to Sir Thomas* that he should leave the residue of his property to her, and undertook and promised that, if he would do so, she would carry into effect his desire and determination in favour of the female Plaintiffs; and that, upon the faith of such undertaking and promise, Sir *Thomas* made his will, dated the 5th of July 1830, and which, after giving two legacies to be paid after the decease of Lady *Staines*, concluded thus: "and, as to all the rest, residue and remainder of my estate, of every nature and kind, and all the property I have, I give, devise and bequeath the same to my said dear wife, her heirs, administrators and assigns, for her own separate use and enjoyment, *having a perfect confidence she will act up to those views which I have communicated to her in the ultimate disposal of my property after her decease:* and I do hereby appoint my dear wife and *Thomas Hodgkinson*, Esq. executrix and executor of this my will."

The Bill further stated that Sir *Thomas* died on the 13th of July 1830, and, on the 27th of September following, Lady *Staines*, alone, proved his will: that, in November 1831, Lady *Staines* married the Defendant *Gunning*, and died, intestate, in January 1832: that the Defendants alleged that Sir *Thomas* never expressed any desire or determination to dispose of any part of his property in favour of the female Plaintiffs; but the Plaintiffs charged that Sir *Thomas* repeatedly expressed,

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to divers persons, that his wishes and intentions as to the ultimate disposal of his property after Lady *Staines's* death, were such as before mentioned: that, on the 30th of June 1830, Sir *Thomas* made a will, which was, in all respects, similar to the will before mentioned, except as to the legacies, which were not contained therein: that the will of the 5th of July 1830, was made for the purpose of the legacies being introduced therein; and that, upon the same being made, the prior will was destroyed; and, *at the time of making the last-mentioned will, Sir Thomas stated and explained to Lady Staines such his aforesaid wishes and intentions, and she undertook to perform the same*; that Lady *Staines* repeatedly admitted, to divers persons, that Sir *Thomas* had expressed to her such wishes and intentions and had enjoined her to fulfil the same, and that she had undertaken so to do; and, as evidence thereof, the Plaintiffs charged that, within a few days after the death of Sir *Thomas*, Lady *Staines* made a will, whereby, after giving two or three legacies, she gave the residue of her estate, both real and personal, to the female Plaintiffs, by the description of her late husband's natural daughters, and that, afterwards, about the 5th of August 1831, Lady *Staines* made another will,* by which she gave to the same persons some considerable legacies; and that Lady *Staines* repeatedly admitted, to divers persons, that the wills so made by her, were made in consequence of the intentions and desire so expressed by Sir *Thomas* as aforesaid; and that *Gunning* and Lady *Staines*, some time after their marriage, burnt or destroyed the wills so made by Lady *Staines*.

The Bill prayed that the will of Sir *Thomas Staines* might be established, and the Trusts thereof performed;

* See *ante*, vol. 5, p. 490, and *post*, p. 663.

and that an account might be taken of his personal estate, and that it might be declared that the Plaintiffs were entitled to the residue thereof, and that such residue might be paid to them; and that it might be declared that the female Plaintiffs were also entitled to the real estates devised by Sir *Thomas Staines*.

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The answers either positively denied or did not admit the allegations in the Bill upon which the claim of the Plaintiffs was founded: and the Defendant *Gunning*, in his answer, said he believed that the views and intentions alluded to in Sir *Thomas Staines*'s will, were that the *Bridgers* (who were Lady *Staines*'s nearest relations, but who, he thought, had behaved ill to himself and to her) should be excluded from any share in his property; and that, subject thereto, the same should be at Lady *Staines*'s absolute disposal: that Lady *Staines* had informed the Defendant that she had made a will a few days after Sir *Thomas*'s death, but that he was entirely ignorant of the purport thereof: and he admitted that Lady *Staines* made another will, dated the 5th of August 1831, and thereby gave, to each of the female Plaintiffs, a legacy of 500 *l.*; and that she made a third will, dated the 9th of November 1831, and, about that time, destroyed her two former wills; and that, on the 18th of November 1831, the third will was, by her desire, delivered up to and destroyed by the Defendant: and he denied, to the best of his knowledge and belief, that Lady *Staines* had made any such admissions as stated in the Bill; but, on the contrary, he said that she always declared that the whole of Sir *Thomas*'s residuary property, was at her disposal, except that he did not wish her to give any part of it to the *Bridgers*.

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Several witnesses were examined on both sides, and, amongst them, all the persons who made affidavits on the motion for a receiver, except the Plaintiffs and the Defendant *Gunning*. The cause now came on to be heard.

The *Solicitor-general*, Mr. *Jacob* and Mr. *Turner*,
 for the Plaintiffs.

The case of the Plaintiffs is that the Testator, Sir *Thomas Staines*, standing in the situation of natural father to them, had obtained, from Lady *Staines*, a promise that, if he would give her all his residuary property, she, at her death, would leave it to his natural children; and that, upon the faith of that promise, the Testator made his will. We have only to make out the facts of the case: the law is perfectly clear. We rely on your Honor's judgment on the motion for a receiver (a). The facts of the case, as now proved, are the same as they were represented to be by the affidavits in support of the motion. It is immaterial that Lady *Staines*, by the will which she made shortly after her husband's death, gave certain legacies; for she might have had other property than that which she took under her husband's will: it is clear that, in making that will, she was complying with her husband's dying injunctions. With respect to what Dr. *Jarris* represents the Testator to have said, namely, that he wished the *Podmores* to have his property after Lady *Staines*'s death, provided she found them respectable (b), it may be observed that there is no suggestion—it is nowhere put in issue that they were not respectable. It is proved that there was the injunction on the part of the Testator and the pro-

(a) *Ante* vol. 5, page 485.

(b) See *ante* vol. 5, page 488 & 489; Dr. *Jarris*'s evidence was to the same effect as his affidavit.

mise on the part of his wife ; and, in conformity to what she had undertaken, she instructed Dr. *Jarvis* to make her will. Besides, this case does not rest on parol evidence merely ; for the Testator, in his will, refers to some injunction which he had given to his wife.

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The Court feels itself justified in disregarding the Statute of Frauds, in all those cases where a compliance with the statute would give effect to the fraud which it was intended to prevent. The statute says that every will must be in writing : but, if a person obtains property under a will upon a parol assurance that he will dispose of it in a particular way, this Court will not allow him to keep the property. *Stickland v. Aldridge* (c), *Devenish v. Baines* (d), *Thynn v. Thynn* (e), *Oldham v. Litchford* (f), *Chamberlain v. Agar* (g), *Muckleston v. Brown* (h), *Reech v. Kennigate* (j), *Drakeford v. Wilks* (k), *Chamberlaine v. Chamberlaine* (l), *Sellack v. Harris* (m), *Bulkley v. Wilford* (n), *Seagrave v. Kirwan* (o), *Walker v. Walker* (p), *Dixon Olmius* (q). These cases show that the doctrine of this Court is applied to real as well as to personal estate. The cases on the Ship Registry Acts are still stronger : for those Acts were passed on grounds of public policy, and not for protecting the rights of individuals. *Mestuer v. Gillespie* (r).

It will be said that, though the Plaintiffs have made

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| (c) 9 Ves. 516. | (l) 2 Freem. 52. |
| (d) Prec. Cha. 3. | (m) 5 Vin. Ab. 521. |
| (e) 1 Vern. 296. | (n) 8 Bligh N. R. 111. |
| (f) 2 Vern. 506. | (o) 1 Beat. 157. |
| (g) 2 V. & B. 259. | (p) 2 Atk 98. |
| (h) 6 Ves. 52. | (q) 1 Cox, 414. |
| (j) Amb. 67 & 1 Vez. 123. | (r) 11 Ves. 621. |
| (k) 3 Atk. 539. | |

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out a case against Lady *Staines*, they have made out no case against the next of kin and heir of Sir *Thomas Staines*: but, if Lady *Staines* took the property on a Trust, the heir and next of kin of Sir *Thomas* must be affected with the same Trust. They must claim on the ground that Lady *Staines* did not perform the promise on the faith of which the property was bequeathed to her: and, therefore, they must claim through a fraud committed by Lady *Staines*. This Court however will not permit third persons to enjoy a benefit which they have derived from the fraud of others. *Huguenin v. Baseley* (s).

Mr. *Wigram* and Mr. *Duckworth*, for the Defendant *Gunning*:

Mr. *Gunning* claims to be entitled to the personal estate, as administrator to Lady *Staines*, and to be interested in the real estates, as tenant by the curtesy.

We do not dispute that the most important of the cases cited, are good law; they do not however affect the present question. Although the Court will prevent a will that has been fraudulently obtained from taking effect, it will not interfere further, but will let the property go as undisposed of, or, if there is a prior, valid will, as disposed of by that will: it will never, give effect to a Trust that is not declared in writing. *Powell v. Mouchett* (t), *Lord Trimlestown v. Lloyd* (u). In *Ex parte Peele* (x), Lord *Eldon* says that, although it had been decided, in some old cases, that, where *A.* made a promise to *B.* for the benefit of *C.*, *C.* might maintain an action against *A.* for a breach of the promise;

(s) 14 Ves. 273.

(t) Madd. & Geld. 216.

(u) 1 Bligh, N. S. 427 &

1 Dow & Cla. 85.

(x) 6 Ves. 602.

yet such was not the law at the present time. It appears, from the language used by Lord *Thurlow* in *Whitchurch v. Bevis* (y), and by Lord *Eldon* in *Mestaer v. Gillespie*, that the Court will not interfere unless a party has been fraudulently prevented from doing those acts which the law requires for giving effect to his intentions. The cases cited for the Plaintiffs also show that the Court has never relieved unless where there was an intention to make a will or do some other act, and the party was fraudulently *prevented* from doing what he intended by the person claiming the benefit of the fraud. You must show that the party intended to comply with the Statute of Frauds and was fraudulently prevented, otherwise you repeal the statute. Lady *Staines* was not guilty of any active fraud : she was no party to the making of the will.

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The next question is whether Sir *Thomas Staines* required Lady *Staines* to leave *all* his property to the *Podmores* : for, in order to create a Trust, the property as well as the person must be certain. If Sir *Thomas* intended that the whole of his property should go to the *Podmores*, he would not have desired his wife not to give any part of it to the *Bridgers*. What could be his motive for suppressing the names of the parties to take ? Secresy could not be his object ; for he told Dr. *Jarvis* and another of the witnesses that his property was to go to the *Podmores* after Lady *Staines*'s death. If that was an imperative obligation extending to the whole of the property, why did Lady *Staines*, almost immediately after her husband's death, propose to *Jarvis* to dispose of part of the property in legacies ; and why did *Jarvis* make a will for her and allow her to

(y) 2 Bro. C. C. 565.

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give the legacies? The case is inconsistent with any other supposition than that Lady *Staines* had a discretion as to what portion of the property she should leave to the *Podmores*.

We submit, first, that Lady *Staines* did not prevent Sir *Thomas* from leaving his property to the Plaintiffs; and, secondly, that she had a discretion as to what share she should give to them: and, consequently, that the case of the Plaintiffs has wholly failed.

Mr. *Knight* and Mr. *Teed*, for the heir-at-law, and Sir *W. Horne* and Mr. *Elderton* for the next-of-kin of Sir *Thomas Staines*:

If parol evidence is admitted, where fraud is not an ingredient in the case, the Statute of Frauds is gone. Here the Testator declares, on the face of his will, that his wife is not to take his property, beneficially, for a longer period than her own life; but who is to take it after her death, he does not mention: and the omission cannot be supplied by parol, without violating the Statute of Frauds. This case is distinguishable from all the cases that have been cited; for, in none of those cases, was there any indication of a Trust on the face of the will. A Testator cannot, by a will duly attested, enable himself to dispose of his real estate by an instrument not duly attested. Suppose a Testator gives his property to *A. B.* in Trust to dispose of it as he should afterwards direct by parol: evidence of the subsequent directions cannot be given; for the Statute of Frauds requires all declarations of Trust to be in writing. We do not say that the Plaintiffs may not have a claim against the assets of Lady *Staines*: but we contend that the property is not fixed with a Trust in consequence of the fraud of Lady *Staines*. Neither the

heir nor the next of kin can be affected by a fraud committed by a third party. As the Testator has said that his wife should take the beneficial interest in his property for her life only, but has not expressed, in his will, to whom it should go afterwards, and as it would be an infringement of the Statute of Frauds to admit parol evidence of his intentions to be given against the heir and next of kin, who were no parties to the fraud if any has been committed, the heir is entitled to the real estate and the next of kin to the personal estate. *Oldham v. Litchford*, *Adlington v. Cann* (y), *Lord Trimlestown v. D'Alton* (z).

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Mr. *Girdlestone*, jun., for the heir of Lady *Staines*.

Mr. *Richards*, for the administrator of Sir *Thomas Staines*.

THE VICE-CHANCELLOR:

This case was argued very elaborately. It arose in 7th May. this way. The Plaintiffs represent that Sir *Thomas Staines*, previously to and at the time of making his will, communicated, to Lady *Staines*, his desire and determination to give the whole of his property, real and personal, to the female Plaintiffs after her death; and that, upon being apprised of that desire, she proposed, to Sir *Thomas Staines*, that he should leave the residue of his property to her, and she undertook and promised that, if Sir *Thomas* would do so, she would carry into effect his desire and determination in favour of the female Plaintiffs, and that, upon the faith of such undertaking and promise, he made his will, which was to this effect. [His *Honor* here read the will.] This instru-

(y) 3 Atk. 141. (z) 1 Dow & Cla. 85, & 1 Bligh, N. S. 427.

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ment was dated on the 5th of July 1830, and it is observable that the words, upon which so much stress was laid in the argument: "Having a perfect confidence she will act up to those views, which I have communicated to her, in the ultimate disposal of my property after her decease," do not necessarily imply that some absolute direction was given to her as to the disposition of the property; but are consistent with the Testator having given, to his wife, either some absolute direction, or some general recommendation, leaving it to her discretion to act upon it or not, and in such manner as she might think fit. The Plaintiffs insist that those words have a necessary relation to that communication which they represent Sir *Thomas Staines* made to his wife, and upon which she made the proposal and gave the undertaking which they state in their bill. Sir *Thomas Staines* died on the 13th of July 1830, and was buried on the 22d of that month. Lady *Staines* made a will on the 24th of July 1830; and, on the 5th of August 1831, she made another will: and, in November of the same year, she married the Defendant Mr. *Gunning*, which, at law, would be a revocation of her will; and, in January 1832, she died: and, after her death, the Plaintiffs filed their bill, in which they pray: [His *Honor* here stated the prayer of the bill].

In this case two questions arise: one is a question of law and the other is a question of fact, both of which it will be necessary for me to notice in disposing of this case.

Upon looking into the authorities, my opinion is that, if it were perfectly clear that that state of circumstances took place which the Plaintiffs represent upon their bill, they would be entitled to the relief that they

ask ; because, independently of some of the earlier cases, which it is hardly worth while to notice, the decision in *Sellack v. Harris*, provided the point were new, would of itself be decisive. That was a case where the father purchased lands for himself and his heirs ; and, when he was upon his death-bed, sent for his eldest son, and told him that the lands were bought with his second son's money, and that he intended to give them to him : whereupon the eldest son promised that the second son should enjoy them accordingly. The father died ; and The *Master of the Rolls* held that the eldest son ought to have the lands, because, by the Statute of Frauds, there ought to have been a declaration of the Uses or Trusts in writing : but Lord Chancellor *Cowper* was of another opinion, because of the fraud in this case ; in that the eldest son promised the father, upon his death-bed, that the other son should enjoy the lands : so he took this to be a case out of the statute. And, in my opinion, the very worst method of construing the Statute of Frauds, would be that which would give rise to frauds instead of preventing them.

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In the case of *Walker v. Walker* (which was one of the cases mentioned at the Bar), the question arose upon these circumstances :

[His *Honor* here stated the facts of the case.]

The agreement between the brothers was not reduced into writing ; and Lord *Hardwicke* said : “ The question is whether the Plaintiff is entitled to have the aid of a court of equity, to recover the annuity. I am of opinion that the Plaintiff is not entitled to have the aid of a court of equity, and that it would be contrary to the rules of justice : for it appears to me plain that *John Walker* intended to grant these annuities conditionally only. The

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Defendant insists that he ought a court of equity to supply to do equity in performing his part which he drew in *John Walker* hold estate charged with the an clear whether, if the Defendant bill to have this agreement established not have done it, upon considering cases, where, one part of the agreement by one side, it is but common, tried into execution on the other other construction on the Statutes, would be to make it a fraud instead of a security against and intention of it."

The subject again came before of *Dixon v. Olmstead*, and there it of it.

I shall next advert to what cases of *Muckleston v. Brownridge*. In the former of the alluding to the case of *Adlin* "There was no Trust upon the paper was written afterwards states that the Testator's intention benefit to charitable purposes. clear a man cannot, by an attach a Trust upon real estate the statute. That must have good plea; unless The Lord said, though they plead the statute admitting the Trust, it would be

(a) 6 Ves. 6

hearing, whether he would not give the heir the benefit of the resulting Trust." The case seems to be very imperfectly reported in *Atkins*, and is principally reported on the argument that took place on the plea, when the matter came before Lord *Hardwicke* on the plea and the answer. But Lord *Eldon* goes on to say: "In a subsequent case (*The Attorney-General v. Duplessis*,) Sir *Thomas Parker*, who must have known *Adlington v. Cann*, took upon himself to examine it; and when it was very material to be accurate upon it; and he says, expressly, Lord *Hardwicke* compelled the Defendants to answer. If so, we see, in a subsequent case, how Sir *Thomas Sewell*, no mean authority, a judge very able and conversant in Equity cases, understood it; and this appears, also, to be the history of *Adlington v. Cann* by a note of Serjeant *Hill*. In the case before Sir *Thomas Sewell*, the original answer, simply, stated the will. A farther answer was required; and, by the farther answer, the Defendants stated that there was a memorandum not duly executed according to the Statute of Frauds; and that memorandum did, certainly, point to a disposition of the real estate to charitable purposes." And then Lord *Eldon* expresses a doubt upon the correctness of the judgment exercised by Sir *T. Sewell* in acting upon the principle. But Lord *Eldon* seems to consider that, so far as the principle was adopted, Sir *Thomas Sewell* had acted rightly, and only doubted how far what he did after he had assumed the principle, was correct. Afterwards, Lord *Eldon* says: "Then, as to the principle: why should it not be so? Surely the law will not permit secret agreements to evade what, upon grounds of public policy, is established." This was a case which related to a supposed Trust in favour of a charity. And then His Lordship adds: "Is the Court to feel for individuals, and to oblige persons to discover, in

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particular cases, and not to feel for the whole of its own system, and compel a discovery of frauds that go to the roots of its whole system." So that, there, Lord *Eldon* appears to assume it as quite clear that, in the case of a dispute between individuals, whether or not a Trust was undertaken either by the devisee who was to take by the devise, or by the heir who would take in default of a devise, that, if the undertaking were proved, the party who gave the undertaking would be bound to fulfil it. He says: "Suppose the Trust was to pay 100 L. out of the estate; and the devisee undertakes to pay it if it is not inserted in the will; this court would have compelled an answer on the ground that the Testator would not have devised the estate to him unless he had undertaken to pay that sum. The principle is that the statute shall not be used to cover a fraud. If that is so between individuals and upon an individual claim, there is, surely, a stronger call upon the justice of the Court to say, upon a private bargain between the Testator and those who are to take apparently under his will, which is to defeat the whole of the provisions and policy of the law, that they shall be called on to say whether they took the estate, as they legally may not do, for charitable purposes."

'Then, in *Stickland v. Aldridge*, where the bill was filed by the heir against the devisee, alleging that the devise was upon a secret Trust for a charitable purpose, Lord *Eldon* says (b): "It would be a strong proposition that the providence of the legislature having attempted, expressly, to prevent a disposition of land for purposes of this sort, was so short as to be baffled by such a transaction as is stated by this bill. The statute was never permitted to be a cover for fraud upon the private rights of individuals; and, though within the intention,

(b) 9 Ves. 519.

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it cannot be said a Trust is declared under these circumstances, it is clear a Trust would be created upon the principle on which this court acts as to fraud. In the ordinary case of an estate suffered to descend, the owner being informed, by the heir, that, if the estate is permitted to descend, he will make a provision for the mother, wife or other person, there is no doubt this court would compel the heir to discover whether he did make such promise." Now Lord *Eldon* speaks of that being the ordinary case; and it shows, therefore, what was the view his mind took of the subject: and then he says: "So, if a father devises to his youngest son, who promises that, if the estate is devised to him, he will pay 10,000 £. to the eldest son, this Court would compel the former to discover whether that passed in parol; and, if he acknowledged it, even praying the benefit of the statute, he would be a trustee to the value of 10,000 £.: and then why, upon a similar principle, should not a Trust be raised as to the whole?" And, afterwards, his lordship says: "In *Adlington v. Cann*, Lord *Hardwicke* was clearly of opinion that, there being nothing in the will attaching a Trust, if the Testator, afterwards, by an unattested paper expressing his own intention not communicated, said the purpose was to devote the estate to a charitable purpose, the devisee might object that he had taken under a will well executed, and the subsequent paper was not well executed. But that is perfectly different from the case of a deviser expressing, in the paper, a Trust which, by contract with the devisee, led to that devise; and Lord Chief Baron *Parker*, accordingly, said Lord *Hardwicke's* opinion was that such a bill must be answered; and Sir *Thomas Sewell* meant to follow it. I formerly expressed doubt,"—that is, in the case of *Muckleston v. Brown*,—"whether he

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rightly decided upon the principle; but the principle he took to be clear law, and that is sufficient."

Sellack v. Harris was a case in which the heir, by his representation to the Testator, intercepted the devise: but Lord *Couper* was of opinion that, though he did so intercept the devise, and the land, at law, descended to him, yet the second son was entitled to have it. Lord *Eldon* does not allude to that particular case; but speaks of the ordinary case of a father devising to the younger son, who promises to pay the eldest son 10,000 *l.*; and he says that, in that case, the younger son would be a Trustee to the value of 10,000 *l.*: and I only point it out because it was attempted to be said, with reference to the case of *Thynn v. Thynn*, that no Trust would attach to the property itself; but that the party might be personally liable, that is, answerable in value. But it is obvious that such an argument cannot apply to a case where the Trust was that the party should have the property: and I cannot but think, supposing it should appear, on examining the evidence, that it supports the case made by the Plaintiffs in their bill, that then they have made out that Lady *Staines*, in the first instance, and those persons who claim under her, take the real and personal estate of the Testator clothed with a Trust for the benefit of the Plaintiffs.

So that the question is reduced to a question of fact: and that requires some critical examination of what is stated by the Plaintiffs, and of what is given in evidence on both sides. But I must observe that the Plaintiffs have, in the most distinct terms, put forward their case in this manner, namely, that, before the will was made, a communication was made by Sir *Thomas Staines* to

Lady *Staines*, in pursuance of which she proposed and undertook to do a given thing, and then he made his will in the manner stated. Now I must say that there is not a particle of evidence to sustain that case: there is no evidence whatever to show that, in consequence of any communication that was made, Lady *Staines* made the proposal which she is stated to have done. There is, certainly, a subsequent statement in the Bill, with respect to which there is evidence; but then it represents the case in a less strong manner. The Plaintiffs charge that Sir *Thomas Staines* repeatedly expressed, to divers persons, that his wishes and intentions as to the ultimate disposal of his property after the death of Lady *Staines*, were such as hereinbefore mentioned. But *that*, in itself, is of no value at all as against Lady *Staines* and those who claim under her; unless it may be taken as corroborative evidence that there was a representation and declaration of intention made by Sir *Thomas Staines* to Lady *Staines*. Then they charge that Sir *Thomas* made a former will of the 30th of June, which was destroyed, but which it is agreed, on all hands, was to the same effect as the will of the 5th of July, except that the will of the 5th of July contained some legacies, and the other did not. The Plaintiffs next charge that the will of the 5th of July, was made for the purpose of the legacies being introduced therein, and that, on the same being made, the will of the 30th of June was destroyed; and, at the time of making the last mentioned will, Sir *Thomas Staines* stated and explained, to Lady *Staines*, such his aforesaid wishes and intentions, and she undertook to perform the same; and that Lady *Staines* repeatedly stated and admitted, to divers persons, that Sir *Thomas Staines* had expressed to her such wishes and intentions, and had enjoined her to fulfil the same, and that she had undertaken so to do.

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Now that is the other statement made by the Plaintiffs with regard to their case: so that, in the subsequent part of the bill, where they charge the transaction, they do not rely on that statement which is contained in the first part of the bill, namely, that Lady *Staines* proposed. That is entirely omitted. The case, then, is reduced to this, that Sir *Thomas Staines*, on the occasion of making his will, expressed his wishes and intentions to Lady *Staines*, and she undertook to act conformably to them. I mention this for the purpose of showing what is the thing really in issue between the parties; because, according to my view of the case, if Lady *Staines* undertook, in consequence of Sir *Thomas Staines* stating to her that he would make a will in a given manner if she would do so and so, then she would be bound. The Plaintiffs then represent that, within a few days after the death of Sir *Thomas Staines*, Lady *Staines* published her will, and, after giving two or three legacies, gave all the rest, residue and remainder of her estate, both real and personal, to the Plaintiffs, *Mary Podmore* and *Margaret Thomasine Podmore*, by the description of her late husband's natural daughters. I confess I was surprised to see it stated in the bill: "that, afterwards and on or about the 5th of August 1831, Lady *Staines* made another will, by which she gave, to the Plaintiffs, some considerable legacies, and that she, in her lifetime, repeatedly admitted, to divers persons, that the wills so made by her as aforesaid were respectively made in consequence of the intentions and desire so expressed by Sir *Thomas Staines*." Now those are the facts which the Plaintiffs represent: and evidence is given, by three persons, as to what was said and done by Sir *Thomas Staines* and by Lady *Staines*: and the Plaintiffs have so constructed their case as to make it necessary, in considering it, to look, very particularly,

not only at what took place at or about the time when Sir *Thomas* was making his will, but also at what Lady *Staines* did after his death. The evidence that is given on that point, appears to me to be extremely material; because, upon the death of Sir *Thomas Staines*, Lady *Staines* was very deeply affected, and she was in a frame of mind which would lead her to do all that she imagined her husband had requested her to do.—[His *Honor* then stated and commented upon the evidence in the cause, at considerable length.]—Dr. *Jarvis*, on the 24th of July, 1830, when every thing that had passed between him and Sir *Thomas Staines* and between Sir *Thomas* and Lady *Staines* in his presence, must have been fresh in his memory, drew up the will of Lady *Staines*, and which is in these words: “I desire that I may be buried at Margate, in the same vault which contains the body of my late beloved husband, Sir *Thomas Staines*, and that the sacred mementos of his affection which he left in my care, be deposited in my coffin at the same time: and I desire that my funeral expenses, my just debts and the expenses of proving this will, be paid. I give, to my much esteemed friend *Thomas Hodgkinson*, Esquire, 500 *l.*, which I request he will accept as a small tribute of attention for the varied acts of kindness both my dear husband and myself have constantly received at his hands. I give, to my valued young friend Miss *Ruth Parkinson*, the sum of 500 *l.*, which I request her to accept as a small proof of the love and affection I bear towards her. I give all the rest, residue and remainder of my estate, both real and personal, to my late husband's two natural daughters, *Mary* and *Margaret Podmore*, as tenants in common. I give, to Captain *William Jones Prouse* the sum of 300 *l.*, as a small proof of the regard I and

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my late dear husband bore him :
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Staines by which the *Podmores* were pointed out as proper objects of bounty, but that he did not mean that, at all events, they should have his property, but intended to leave Lady *Staines* at liberty to exercise her discretion, not only as to whether the *Podmores* should have his property or not ; but also as to what part they should have, if they took anything. The contemporaneous act (as I may call it) of the will of the 24th of July, and the evidence of Dr. *Jarvis*, who twice refers to the use of the expression : " If you find them respectable," prove to my mind that that discretion was vested in Lady *Staines* ; and the will of the 5th of August 1831, which the Plaintiffs themselves state, is a confirmation of the inference which I have drawn.

My opinion is that the Plaintiffs, if they had proved their case, would have been entitled to the relief which they ask : but they have so completely failed in proving it, that I must dismiss their bill with costs.

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*Injunction.
Practice.*

The court will not alter its practice as to granting Injunctions, notwithstanding the greater rapidity of proceedings at law, in consequence of the New Rules of 1834.

MR. *KNIGHT* and Mr. *Willcock*, for the Plaintiff, moved, specially, for an injunction to stay the trial of an action, which was to take place, at the *Northampton* assizes, on the next day but one. They said that the practice of the courts of law, as altered by the New Rules promulgated by the Judges in 1834, did not allow sufficient time for the Plaintiff to obtain the common injunction and then move to extend it to stay trial: they referred to *Hine v. Fiddes* (a).

Mr. *Jacob* appeared to oppose the motion.

The *Vice-Chancellor* refused the motion, on the ground that the alteration in the practice of the courts of law, was contemplated at the time when Lord *Brougham's* Orders of 1833 were made; and, though some of those orders related to injunctions, they did not provide for any alteration in the practice of this Court respecting them.

(a) 2 Sim. & Stu. 370.

SCHOLEFIELD v. HEAFIELD.

1836:
27th February.

THE Plaintiffs and *Richard Rotton* were copartners, as bankers, at *Birmingham*. *Richard Rotton* engaged in a joint speculation with one *Mole*, to buy land and build upon it. In order to pay for the land and buildings, they borrowed money of the bankers, and deposited with them the title-deeds of the land purchased, as a security for the money borrowed. *Richard Rotton* died leaving an infant heir. After his death the surviving partners in the bank, filed a bill against his heir and *Mole* (without making his personal representative a party) for a sale of the land to which the title-deeds related.

Parties.
Partners.

A. and *B.* deposited with a firm, of which *A.* was a member, the title-deeds of an estate of which they were joint owners, as a security for a debt due from them to the firm. *A.* died intestate. The surviving partners in the firm filed a Bill against his heir and *B.* for a sale of the estate. Held that *A.*'s personal representative ought to have been made a party to the suit.

Mr. Jacob and *Mr. G. Richards*, for the Defendants, objected that the personal representative of *R. Rotton* ought to have been made a party to the bill; for that the surviving partners had no right to sue without having the representative of the deceased partner before the Court: *Pierson v. Robinson* (a): and as it might turn out, on taking the accounts of the partnership, that nothing was due, to the firm, from *Richard Rotton*'s estate.

Mr. Knight and *Mr. Sharpe*, for the Plaintiffs, said that the surviving partners in a firm, might sue for a debt due to the firm, without making the personal representative of a deceased partner, a party to the

(a) 3 Swanst. 139, note.

1836.

SCHOLEFIELD

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suit: that a person who has a might, if he pleased, make his the real estate, and the heir and to settle the matter between t tween the heir and the creditor, to enforce his demand against t heir might resort to every spec to show that there was no deb nor indeed would it be of any party to the record for that universally the practice of the are dealing together and one partner in both firms, to treat distinct firms; otherwise, no blished by one of the firms ag going through the accounts of be no set off in this case; for a be set off against a joint debt; of the bank had a right to have due from *Richard Rotton* and faction of their demands.

The VICE-CHANCELLOR:

I can understand, in a general be a suit by the surviving p comprehended *A.*, against th another firm, which also con making the personal representa this case is in this singular posit meant to be a security for the cannot be stated, without its a tive situation of the parties, th cumstances to show, at once, t satisfied. If, for instance, *R. I* have the accounts so kept be

partners, that, at all times, they should have, in their hands, a sufficient balance to satisfy the debt, ought the partners who have, in their hands, that balance, to sue *Mole* and the heir of *R. Rotton*, without making the personal representative a party; the heir being, in equity, entitled to make the personal estate of *R. Rotton* pay the debt, and to have his own estate exonerated from it. If the heir suggests that the debt has been satisfied as between *R. Rotton* and his surviving partners in the bank, he suggests a case that must be investigated; and how can it be investigated in the absence of the personal representative of *R. Rotton*? There might be the most unjust circuitry of suit unless the personal representative were made a party.

The cause must, therefore, stand over in order that *R. Rotton's* personal representative may be made a party.

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ON the hearing of this cause, the estate to which the title deeds related, was ordered to be sold, it appearing to the Court that a sale was more beneficial to the infant than a foreclosure. In the minutes of the decree, as prepared by the Registrar, the infant was allowed six months after coming of age, to show cause against the decree.

Mr. *Knight Bruce* and Mr. *Sharpe*, for the Plaintiffs, contended, on the authority of *Powys v. Mansfield* (a),

day to show cause against the decree, on coming of age: but, in a decree of foreclosure, the day ought to be allowed.

1837:
17th November.
Infant Heir.
Equitable Mortgage. Decree.

In a decree for sale, against the infant heir of an estate subject to an equitable mortgage, the infant ought not to be allowed a

(a) *Ante*, vol. 6, page 637.

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that the infant was not entitled to the property for six months, especially as it was in the direction in the decree for the object of 11 Geo. 4 and 1 was to enable the Court to in all cases where it might standing the infancy of the estate.

It was also stated, at the time on the motion in *Powys* v. repealed from; but that the order was over until after the decision of the decree; and that the decree had become unnecessary to pro

The *Vice-Chancellor* said that the *Lord Chancellor* on the point.

1837:

18th November.

His *Honor*, on this day, said with The *Lord Chancellor*, and was of opinion that, as the decree was made, the infant ought not to be sold, but that if the decree had been made the infant ought to have been allowed

* By The *Lord Chancellor* on the

BROOKE v. TURNER.

FRANCES BROOKE, by her will dated the 29th of September 1830, devised part of her real estates to Trustees, in Trust to receive the rents for the use and benefit of her niece *Catharine Dorothy Jones*, and to pay the same as follows, namely, 200*l.* yearly, to her niece whilst she should be under the age of 27 years and not a housekeeper; and 300*l.*, yearly, on her niece becoming a housekeeper; and, from time to time, to invest the residue of the rents in the funds, to accumulate until her niece should attain 27 years of age or be married, and then to permit her niece to receive the whole of the rents, and to transfer all the securities wherein they should be invested, unto her niece, her executors, administrators and assigns: and the Testatrix empowered her niece to settle one moiety of the hereditaments devised in trust for her, on any person with whom she might intend to marry, for his life: and she declared that, in the event of her niece marrying and having issue, the Trustees should stand possessed of the same hereditaments in trust for such children of her niece, as she should, by her will, direct, and, in default thereof, then for the equal use of all the chil-

1836:
5th & 7th Mar.

Will.
Construction.

Testatrix bequeathed to her niece, her pictures and her collection of coins (except those of the two last and present kings) in and about her dwelling-house: and all the residue of her estate, both real and personal, (except as after otherwise disposed of) she gave to her grandchildren: and she directed that, from and after the day of her interment, all the property over which she had any disposing power,

in and about her dwelling-house (except what she had otherwise given) should belong to her niece, and not be subject to diminution except by her personal act and authority. After the Testatrix's death, guineas, sovereigns, Bank of England, country bank, and promissory notes and a mortgage, to a large amount in the whole, were found in her house. Held that the niece (notwithstanding an annuity and a sum in gross were given to her by the will) was entitled to the guineas and sovereigns, and also to the Bank of England notes, but not to the country bank or promissory notes, or the mortgage.

:336.

BANKER

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CLASS

dren of her niece, as tenants in common, their heirs and assigns. And the Testatrix gave a piece of land, which she had agreed to purchase, to the Trustees and their heirs, upon Trust to stand possessed thereof, for the life of her niece, for her sole use and benefit. And she directed her Trustees to stand possessed of so much of her stocks, funds and securities as should be sufficient, with the net rents, at the time of her decease, of the hereditaments she had devised to or in trust for her niece, to produce, at least, a yearly income of 500*l*.; and she declared that so much of the stocks, funds and securities as her Trustees should stand possessed of for the last-mentioned purpose, should, on her niece attaining the age of 27 years or being married, be transferred to her as she should direct, together with all the increase and accumulations thereof. And, after reciting that it was possible that, at the time of her decease or subsequently, a larger net yearly income might be arising from the hereditaments which she had before devised to or in Trust for her niece, than the sum of 500*l*., she therefore declared that her niece should be entitled to such excess whatever it might be.

The will then proceeded as follows: "I give and bequeath unto my grandson, *Fitzherbert*, the miniature pictures of Mr. *Brooke* and myself: and I give and bequeath all other my pictures, and also all my paintings in and about my dwelling-house at *Chipping Sodbury* and at *Horton*, and also my collection of foreign and other coins of gold, silver and copper (*except those of the two last and present kings*) unto my said niece, *Catharine Dorothy Jones*, together also with my marble figures, also my telescope with the brass stand, my china jars and ornaments, my two parrots, my books, furniture, plate, china, linen, clothes, pearls,

trinkets, carriage and horses, and *all other similar moveable articles and things in and about my dwelling-house at Chipping Sodbury and at Horton*, except my minerals and fossils: I also give and bequeath unto my said niece, *Catharine Dorothy Jones*, for her use and benefit, the sum of 500 *l.* out of the rents and arrears of rent of all or any of my farms, lands, hereditaments and premises that may be due and owing to me at the time of my decease. With respect to all and singular my minerals and fossils, I give and bequeath the same unto *Henry*, the son of my nephew the Rev. *John Turner*."

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The Testatrix then gave several pecuniary legacies, and continued thus: "All the rest, residue and remainder of my estate and effects, both real and personal (*except as after otherwise disposed of*) I give, devise and bequeath unto all my said grandchildren, equally between them, and their several heirs, executors and administrators, as tenants in common. I hereby nominate and appoint the said Rev. *John Turner*, my sister *Elizabeth Jones*, and my said niece, *Catharine Dorothy Jones*, the executor and executrixes of this my will: and I do direct that, from and after the day of my interment, *all the property of every sort and kind, over which I have any disposing power, in and about my said dwelling-house (except what I have otherwise given)* shall exclusively belong to my said niece, *Catharine Dorothy Jones*, and not be subject to diminution, except by her own personal act and authority."

The Testatrix, by a codicil dated the 1st of November 1830, gave to her niece, *Catharine Dorothy Jones*, the sum of 500 *l.* in addition to all the legacies and bequests given to her by the will.

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The Bill was filed by one of residuary legatees under the will, against executrixes and the other devisees, alleging that, at the Testatrix's day of her interment, there were cash, bank notes, bankers' notes, bankers' deposit notes, and also and that *Catharine Dorothy Jones* was entitled thereto under the bequest of personal property, of every sort and kind, over which she had any disposing power, in and about her house; but the Plaintiff charged that the Testatrix did not mean, by the terms of such bequest, that *Catharine Dorothy Jones*, the devisee, should but intended that the same should form part of the residuary personal estate. That the will might be established and that the cash and other articles should form part of the Testatrix's residuary estate.

By the decree at the hearing, it was ordered that the Plaintiff should to inquire and state whether there were cash, bank notes, bankers' notes payable to the Testatrix, bankers' notes and mortgages, and to what persons, and what articles were in the Testatrix's house on the day of her interment.

It appeared, by the report, that there was cash, after the Testatrix's interment, concealed in different parts of her house, viz. gold coins, silver coins, seven-shilling pieces, silver bank notes, country bank notes, and various individuals, an account book, a banker's deposit note, amounting to 9,000*l.* and 10,000*l.* and also

gage for 500 *l.*, and the title-deeds relating to the mortgaged premises.

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The cause now came on for further directions.

Mr. *Wakefield* and Mr. *Piggott*, for the Plaintiff :

The Testatrix's niece *Catharine Dorothy Jones*, is not entitled to any of the articles enumerated in the report. The clause which directs that, after the day of the Testatrix's interment, all the property in and about her dwelling-house, except what she had otherwise given, should exclusively belong to her niece and not be subject to diminution except by her own personal act and authority, relates only to consumable articles. The Testatrix considered that her family would live in her house for some time after her death ; and she meant that the consumable articles should not be diminished by them after her funeral. If she intended to give, to her niece, all her property in her house except what she had previously given, why did she mention the day of her interment and not the day of her death ?—By the will she limits the expenditure of her niece to 300 *l.* a year until she should be 27 years old, and she gives her a legacy of 500 *l.* ; and then, by the codicil, she gives her another legacy of 500 *l.* : can it then be supposed that she intended to give her also a present interest amounting, nearly, to 10,000 *l.* ?—The country bank-notes, promissory notes, accountable memorandum, deposit note and mortgage, are not property ; they are merely securities for money or evidences of debts ; and, like other choses in action, have no locality. Nor will the guineas, sovereigns, seven-shilling pieces and silver, pass by general words descriptive of locality. Besides, the Testatrix, in enumerating the articles which she intended to give to her niece, excepted her coins of the two last and present kings, by which, it is clear that she

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meant every thing in the nature supposed that, after having made having given the legacies to her pass her ready money by the gift v. *Earle* (a), *Woolcomb* v. *Wool Kuffin* (c), *Jones* v. *Lord Sefton* (Moore v. *Moore* (f), *Green* v are some dicta that Bank of England considered as cash: but, in *Sturges v. Bute* (h), Lord *Eldon* says: *Aylesbury's Case* (j); which is a *Mansfield*, in *Miller* v. *Race*; but accurately. It was a bequest that shall be in it at my death.' that cash passed, and bank-notes wicke, there, I do not know whether but not promissory notes and as the evidence of title to things out of things in it. Bank-notes I think situation."

Mr. *Barber* and Mr. *Dixon*
defendants in the same inter

The question in this case is a By the word 'property,' the things *ejusdem generis* as those which she preceding part of her will. As she her niece an annuity and a legacy not intend, by the subsequent anything of a pecuniary nature

- | | |
|-------------------------|-------|
| (a) 2 Cha. Rep. 190. | (g) |
| (b) 3 P. W. 112. | (h) |
| (c) 2 Atk. 112. | (j) |
| (d) 4 Ves. 166. | bury, |
| (e) 1 Scho. & Lef. 318. | 1748, |
| (f) 1 Bro. C. C. 127. | |

[The *Vice-Chancellor*.—It is clear that the Testatrix kept alive in her recollection the existence of cash in her house, as she excepted the coins of the two last and present kings: and, therefore, they must pass either under the general residuary clause, or under the next clause.]—It is impossible to hold that the cash can pass to the niece by the latter clause; for, if the Testatrix had intended her niece to have it, she would not have excepted it in the clause in which she gives her pictures, &c. to her niece. However comprehensive the words of a bequest may be, they will not pass property which it appears, from other parts of the will, the Testator did not intend that they should pass. *Sutton v. Sharp* (k), *Hastings v. Hane* (l). Bank of England notes cannot be considered as cash. They never were, in strictness, a legal tender; although a party could not be held to bail for a debt, if he tendered the amount in them.

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The *Solicitor-General*, Mr. *Swanston*, Mr. *Cooper*, and Mr. *Winterbottom* appeared for the other Defendants in the same interest as the Plaintiff, and referred to *Stuart v. The Marquis of Bute* as reported on the appeal (m), *Fleming v. Brook*, *Hotham v. Sutton* (n), *Read v. Stewart* (o), and *Chapman v. Hart* (p).

THE VICE-CHANCELLOR:

My opinion is that the legatee is entitled to the money; for it stands in quite a different situation from any of the other articles mentioned in the *Master's* report.—It has been stated, by Mr. *Wakefield*, that, where there has been a gift of money and then a bequest to the same legatee, in general words, of things in a

(k) 1 Russ. 146.

(l) *Ante*, vol. 6, p. 67.

(m) 1 Dow, 73.

(n) 15 Ves. 319.

(o) 4 Russ. 69.

(p) 1 Vez. 271.

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house, the legatee is not entitled, under the general words, to any cash that may be found in the house; because the Testator has shown, expressly, what quantity of money he intended the legatee to take: and many cases were cited in support of that proposition: but none of them bear any resemblance to the present. It must be conceded that, when the Testatrix, in the clause in which she disposed of her general residuary estate, made the exception: "except as after otherwise disposed of," she meant that exception to comprehend something which she intended to bequeath afterwards: and we find that, in the following clause, she does dispose of all the property in or about her dwelling-house, except what she had otherwise given. Now, in the former part of the will, she had said: "I give and bequeath all other my pictures, and also all my paintings in and about my dwelling-house at *Chipping Sodbury* and at *Horton*, and also my collection of foreign and other coins of gold, silver and copper (except those of the two last and present kings) unto my said niece, *Catharine Dorothy Jones*, together also with my marble figures &c. and all similar moveable articles and things in and about my dwelling-house at *Chipping Sodbury* and at *Horton*." So that, in this clause, she disposes of the coins in and about her dwelling-house, except those of the two last and present kings. And then she makes a general disposition of all the rest, residue and remainder of her estate and effects, both real and personal, except as after otherwise disposed of: and the only property which she afterwards disposes of, is the property in and about her dwelling-house which she had not otherwise given. Therefore, by referring from one clause to another, it appears to be perfectly plain that the Testatrix has given her coins of the two last and present kings, under the description of property in and about

her dwelling-house, which she had not otherwise given. The consequence is that her niece is entitled to the guineas, sovereigns, seven-shilling-pieces and silver money mentioned in the report.

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Mr. Knight, Mr. Jacob and Mr. Parry, for the
Defendant *Catharine Dorothy Jones* :

We contend that not only the money, but also the Bank of England notes, country bank notes, promissory notes, accountable memorandum, banker's deposit note and mortgage, passed to the Testatrix's niece, as property in the Testatrix's dwelling-house, over which she had a disposing power.

There is no case, not even *Fleming v. Brook*, in which the words were so comprehensive as they are here : and, in that case, Lord *Redesdale* held that bank notes would pass. The words : "over which I have any disposing power," include everything that can be made the subject of testamentary disposition. There is considerable peculiarity in the language of this bequest. The Testatrix directs that, from and after the day of her interment, all the property over which she had any disposing power in and about her dwelling-house, should belong to her niece. In putting a construction on this bequest, regard must be had to the habits of the Testatrix. She was fond of hoarding and hiding money, and made her house a receptacle for all her property. She mentions the day of her interment as the time at which her niece was to become entitled to her property, as that is the day on which wills are commonly opened ; and she intended her to sweep away all the property that, on a search, should be found in and about her house, and that neither her executors nor the Stamp-office should know anything about it. The Testatrix,

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in the preceding part of her will, had given, to her niece, all the ordinary contents of a house; and, by the clause now in discussion, she intended to give her all her boards.

In *Popham v. Lady Aylesbury*, the Testator bequeathed his house and all that should be in it at his decease. The words were not so strong as in the present case, and yet bank notes were held to pass. In *Chapman v. Hart* it was held that bank notes would pass as goods and chattels in the Testator's house: can it then be said that they would not pass as property over which the Testatrix had a disposing power? In *Read v. Stewart*, it was held that a promissory note did not pass by a gift of a cabinet with whatever it contains, except money: but suppose it had been a gift of a cabinet with whatever it contains over which I have any disposing power, would not the promissory note have passed? In *Moore v. Moore*, the Testator bequeathed all his goods and chattels in *Suffolk*, and it was held that a bond would not pass. But there also the comprehensive words that are found in this will, were not used. There is much less difficulty now, than there was formerly, in holding that the mortgage passed: for it is now settled that either a bond or a mortgage may pass by a *donatio mortis causâ*.

Hotham v. Sutton is an important authority in our favour. There, bank-notes were considered as money: and therefore, they will pass with the coins in this case. Every word of Lord *Eldon's* reasoning applies to this case. (q).

Mr. *Wigram* appeared for the trustees and executors of the will.

(q) See 15 Ves. 326, 327.

The VICE-CHANCELLOR:

It struck me that that portion of the property which was not coin, stood in a very different situation from the coins of the two last and present reigns ; because the Testatrix had used the expression “ property in and about my dwelling-house :” and the question is whether, whatever may be the meaning of those words in common parlance, securities for money can, in a court of law, be said to be property in a particular place. I cannot but conjecture, from the whole tenor of this will, that, if the Testatrix had been informed that there was any doubt as to the effect of those words, she would have used such language as would have passed all the property which is now the subject of discussion. But I am bound to construe the words according to the sense which the law puts upon them. If a person were to give all the property in his house, and certain title deeds happened to be in it, it never could be contended that the land to which those title deeds related, would pass to the Legatee, nor could it be contended that the title-deeds of land devised to another person, or allowed to descend to the heir, would pass ; for they are necessary to the land, and would belong either to the heir or to the devisee, as the case might be. Therefore I am not at liberty to say that either the country bank-notes, promissory notes, accountable memorandum, deposit note or mortgage, passed to the Testatrix’s niece : but as it appears that Lord *Hardwicke* held that Bank of England notes passed under the bequest in *Lady Aylesbury’s* case (r), and as Lord *Eldon*, though he expressed a doubt as to the principle of that decision, did not expressly over-rule it (s), I am of opinion that, in this

(r) The Registrar’s book containing the decree in *Popham v. Lady Aylesbury*, was produced to His Honor.

(s) See 11 Ves. 662.

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case, the Bank of England notes, as well as the coins, passed under the clause in question to the Testatrix's niece.

MEMORANDUM.

On the 16th of January 1836, The Lords Commissioners resigned the Great Seal, which was delivered, by His Majesty, to Sir *C. C. Pepys*, M. R., who was created a Peer of the United Kingdom, by the title of *Baron Cottenham of Cottenham* in the county of *Cambridge*.

Henry Bickersteth, Esq., one of His Majesty's Counsel, was appointed Master of the Rolls in the place of Sir *C. C. Pepys*, and was created a Peer of the United Kingdom, by the title of Baron *Langdale* of *Langdale* in the county of *Westmorland*.

AN INDEX TO THE PRINCIPAL MATTERS.

ACCOUNT.

Payments made by an administrator *de son Tort*, pending a suit for an account of an intestate's estate, to a person who took out administration after the institution of the suit and was thereupon made a co-defendant, will not be allowed. [*Layfield v. Layfield*] - - - - - 172

See AGENT.—Costs, 3.

ACCOUNTANT.

In taking the accounts of an intestate's estate, the plaintiffs, in consequence of the evasive and fraudulent conduct of the administratrix, had been under the necessity of employing an accountant. Before the hearing for further directions, the administratrix was ordered to pay the costs of employing the accountant. [*Toner v. Thompson*] 145

ACCUMULATION.

See RESIDUE, 3.

ACT OF PARLIAMENT.

By an Act of Parliament The London Dock Company were empowered to purchase lands for the purposes of the Act, and, in certain cases, the purchase-monies were to be re-invested in the purchase of other
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lands, and the expenses of the re-investment were to be paid by The Dock Company. In a subsequent part of the same Act, the Lords of the Treasury were empowered to purchase certain legal quays within a given time; but no express directions were given as to the reinvestment of the purchase-monies, or as to the payment of the expenses. By a subsequent Act, not relating to the Dock Company, the time given to the Lords of the Treasury for purchasing the legal quays, was extended; and it was enacted that all the powers, provisions, regulations, directions, clauses, matters and things in the former Act, should extend to the subsequent Act. Held that the clauses in the former Act, as to the reinvesting of purchase-monies and the payment of the expenses of such reinvestment, were applicable, *mutatis mutandis*, to the subsequent Act. [*In re The Lords of the Treasury ex parte The Fishmonger's Company*] - - - - 154

See AGREEMENT, 3, 4.—CONSTRUCTION, 16.

ADMINISTRATION.

Where an annuity for a term of years forms part of a residue, the execu-
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tors, until they can sell it, must invest the payments, and the interest of the investments will belong to the tenant for life of the residue. [*Crawley v. Crawley*] - - - 427

See CONSTRUCTION, 15.

ADMINISTRATOR.

See ACCOUNT, ACCOUNTANT, EXECUTOR.

ADVOWSON.

An advowson descended to four coparceners, A., B., C. and D., who agreed to present in succession, according to their seniority. When the third turn came, C. had died, leaving two co-heirs, E. and F., between whom the right to present was disputed. F. however presented, and, on the next avoidance, E. presented. Held that the presentations by E. and F. were to be counted, though they were usurpations on the rights of F. and D. respectively, and that, on the seventh avoidance, F. would be again entitled to present. [*Richards v. The Earl of Macclesfield*] - - - - - 257

AFFIDAVIT.

The plaintiff applied for a special injunction, *ex parte*, but the Court required him to give notice of the motion. After service of the notice, but before the day mentioned in it arrived, the answer was filed. On the motion being renewed, affidavits filed with a view to the *ex parte* application, were allowed to be read. [*Atkinson v. Kemble*] - - - 638

See INJUNCTION, 1.

AGENT.

Preparatory to the final winding-up of a trust, the agent and solicitor

of the trust to his bankruptcy general assignment of money was made. The costs of the inquiry a month failed. It was not informed the mon credit of as the parties not necessary the trust, were joined. [*Macdon* See BA

1. Time is, essence of contract with an annuity. Therefore a concurrent chapter January, the month bill filed for performance. [*Carter v. Ely*] - -
2. An entry ration, of entered in them, although majority
3. An agreement way bill legal. [*Junction* .
4. The project ing a bill corporati

ment on behalf of the proposed corporation, in consequence of which a threatened opposition to the bill was withdrawn. Held that the corporation, having received the benefit of the agreement, were bound by it - - - - - [Ibid.]

5. The principle upon which courts of equity relieve against securities taken by an attorney from his client, apply to all cases in which confidence is reposed by one party in the other: therefore, the Court will relieve against an agreement taken by a medical adviser from an aged patient, by which the former, in consideration of his past and future services, was to be paid 25,000*l.* after the death of the latter. The Court was also of opinion that the agreement was void at law: as it was an inducement to the medical adviser to accelerate his patient's death. [*Dent v. Bennett*]

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See COVENANT, 1.

ALIMONY.

Whether a bill by the executors of a married woman, against her husband, to recover arrears of alimony due at her death, is sustainable. *Qu.* [*Stones v. Cooke*] - - - 22

ANNUITY.

Where an annuity for a term of years forms part of the residue, the executors, until they can sell it, must invest the payments, and the interest of the investments will belong to the tenant for life of the residue. [*Crawley v. Crawley*] - - - 427

ANSWER.

A purchaser for valuable consideration who submits to answer, must

answer fully. [*The Earl of Portarlington v. Soulby*] - - - 28

See INSUFFICIENCY.—PRACTICE, 6.—PROCESS, 1.—SUPPLEMENTAL ANSWER.

APPOINTMENT.

If the donee of a power appoints the fund to one of the objects of the power, under an understanding that the latter should lend the fund to the former, although on good security, the appointment is bad. [*Arnold v. Hardwick*] - - - 343

See CONSTRUCTION, 19.—PRACTICE, 17.

APPORTIONMENT.

See POWER OF SALE.

ASSIGNEE.

See CONDUCT OF SUIT.—DEMURRER, 3.

ASSIGNMENT.

See INSOLVENT DEBTOR.—REVERSION, 2.

ATTACHMENT.

See COSTS, 4.

ATTORNEY.

See AGREEMENT, 5.—SOLICITOR AND CLIENT.

AWARD.

A. having a claim on property which he knew was the subject of a reference between C. and D., suffered the award to be made, without bringing forward his claim. Held that he was bound by the award. [*Govett v. Richmond*] - 1

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BANK-NOTES.*See* CONSTRUCTION, 18.**BANK STOCK.***See* CONSTRUCTION, 15.**BANKRUPT.**

1. A. a merchant in Liverpool, being indebted to B. a merchant in London, on the 11th of April, sent, at B.'s request, a written order to C., his agent in Bahia, to deliver to B's agent there, all the goods belonging to A. in his, C.'s hands. On the 23d of May, A. committed an act of bankruptcy, on which a commission issued. On account of the distance of Bahia from England, the order did not reach C., till after the 23d of May. Held that B. had a lien on the goods for his debt. [*Burn v. Carvalho*] - - - - - 109

2. In 1828 A., a trader, conveyed his estates and certain monies due to him, which were, substantially, the whole of his property, to trustees in trust to sell, &c., and pay his creditors. In 1830 the trustees sold part of the estates to B., and A. joined with the trustees in the conveyance to B. In 1833 B. sold the purchased premises to D., who objected to the title, on the ground that the conveyance of 1828 was an act of bankruptcy. No commission, however, had issued against A. Held that the conveyance to B. was protected by the 86th sect. of the Bankrupt Act. [*Earl Granville v. Danvers*] - - - - - 121

See MORTGAGOR AND MORTGAGEE, 1.**BASTARD.***See* NEXT OF KIN.**BILL**

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BREACH OF TRUST.

A. a partner in a house of agency in India, died, having by his will, directed his estate to be called in, and invested on certain trusts, and appointed two of his copartners his executors. They, however, suffered his share in the partnership to remain in the house. After A.'s death, B. and C. were admitted as partners, and they knew that A.'s share was remaining in the house, and that it was subject to the trusts of his will. They afterwards retired, and other partners were admitted. The house ultimately failed. Held that B. and C. were not responsible for the breach of trust committed by their copartners, the executors. [*Twysford v. Trail*] - - - - 92

See AGENT.—TRUSTEE, 1, 2.

CERTIFICATE.

The four-day order, if obtained before the filing of the certificate that the defendant has made default in putting in his examination, is irregular. [*Frisby v. Stafford*] - - - - 365

CHAPEL.

See DISSENTING MEETING-HOUSE.

CHARITY.

See DEMURRER, 4.—DISSENTING MEETING-HOUSE.

CHURCH LEASE.

See AGREEMENT, 1.

COINS.

See CONSTRUCTION, 18.

COLLUSION.

1. Devisees and legatees filed a bill against the trustees and executors

of the will and a mortgagee in possession of part of the estates, alleging that the trustees and executors, colluding with the mortgagee, refused to make him account for the rents which he had received, or to redeem the mortgage, and praying for an account of the testator's assets, and that the mortgage might be redeemed. A demurrer, by the mortgagee, for multifariousness, was allowed. [*Pearse v. Hewitt*] 471

2. A bill by a person beneficially interested in a testator's estate, against the executors and a debtor to the estate, cannot be sustained, although it alleges collusion between the co-defendants, unless it is confined to the recovery of the debt. [*Ibid.*]

See DEMURRER, 3.

COMMISSION TO EXAMINE WITNESSES.

A commission to examine witnesses, awarded to the judges of one of the supreme Courts in India, under 13 Geo. 3, c. 63, s. 44, ought to recite the pleadings at length. [*Murray v. Lawford*] - - - - - 139

COMMITMENT.

A motion to commit cannot be made except on a seal-day. [*Sarby v. Sarby*] - - - - - 140

COMMON INJUNCTION.

See INJUNCTION, 1—3.

CONCURRENT LEASE.

See AGREEMENT, 1.

CONDUCT OF SUIT.

After decree, one of the defendants became insolvent, and his assignee,

without notice to the plaintiff, filed a supplemental bill against all the parties to the suit. Afterwards the plaintiff filed a supplemental bill against the assignee alone. A motion, by the assignee, that the plaintiff's supplemental bill might be taken off the file, for irregularity, was refused. [*Philippis v. Clark*] 231

CONSTRUCTION.

1. Testator by his will gave to his son a legacy of 3,000*l.*, and, by a codicil, a legacy of 4,000*l.* in addition to the legacy of 2,000*l.* given by his will. Held that the son was entitled to the legacy of 3,000*l.* in addition to the legacy of 4,000*l.* [*Gordon v. Hoffman*] - - - 29
2. Testatrix bequeathed as follows: "I give the legacy of 4,000*l.* to A., and, in case of his decease, I give the same legacy to his wife, and, at her decease, to their eldest daughter." Held that A., having survived the testatrix, was absolutely entitled to the legacy. [*Crigan v. Baines*] 40
3. Testator gave to his wife, certain articles of his personal estate, which he mentioned specifically, and also certain portions of his real estates free from the mortgages thereon, and the benefit of certain contracts which he had entered into for the purchase of other real estates. And he devised the rest of his real estates to A. B., in trust to sell, and, out of the proceeds, to pay, in the first place, his funeral and testamentary expenses, his debts due on the mortgages of the estates devised to his wife, the sums due on the contracts and all his other debts, and, in the next place, he directed certain sums to be paid, out of the proceeds, to different persons, and

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- extend to the subsequent Act. Held that the clauses in the former Act as to the re-investing of purchase-moneys and the payment of the expenses of such re-investment, were applicable, *mutatis mutandis*, to the subsequent Act. [*In re The Lords of the Treasury ex parte The Fishmongers' Company*] - - - 154
6. Testator gave a sum of money to trustees, in trust only and for the use and benefit of his adopted daughter, and which he desired might be paid to her, and to be settled on her during her life, in case of her marriage: or, in case she did not marry, then the interest of the money, being vested in Government Securities, to be paid to her: and, in the event of her not marrying or dying, then the money to go to his nephews. The daughter married, and, shortly afterwards, died without issue. Held that her husband, who had taken out administration to her, and not the testator's nephews, was entitled to the fund. [*Hawkins v. Hawkins*] - - - 173
7. Testator bequeathed his personal estate to his wife, for life, and, after her death, to a trustee, in trust to pay the rents and profits of his personal estate, for and towards the support and maintenance of his six nephews and nieces, and in case of the death of any of them, for the maintenance and support of the survivors. All the nephews and nieces survived both the testator and his widow. One of the nieces then died. Held that her share did not become undisposed of, but that she, by surviving the testator's widow, had become absolutely entitled to it. [*Clarke v. Gould*] - - - 197
8. Testatrix bequeathed her residuary estate to trustees, in trust to pay and divide the interest between her two nieces, equally, during their lives, and, after their deaths, to pay and divide the principal, unto and amongst the lawful issue of her said nieces, or of such of them as should leave issue, equally, *per stirpes* and not *per capita*; and, in default of such issue, to pay the interest to certain other persons, for their lives, &c. One of the nieces died, having had seven children, five only of whom survived her. Held, that those five became entitled on their mother's death to her moiety of the residue. [*Cross v. Cross*] - - 201
9. Testator bequeathed a sum of stock to A. and B., for their lives, and, on their deaths, to their children then living who should attain 21, with a gift over to the survivor of A. and B. in case the children of either of them should die under 21. A. died leaving a child who had attained 21. B. afterwards died without having had a child. Held that A.'s personal representatives were entitled to B.'s moiety of the stock. [*Aiton v. Brooks*] - - - - - 204
10. Testator directed his trustees to invest such a sum as would produce 40*l.* a year, and to pay the same to his daughter, and, after her death, to transfer the fund to his residuary legatees: and he gave 100*l.* to his daughter absolutely. By a codicil he revoked the sum of 1,200*l.* given to his daughter for her life, and gave her 500*l.* in lieu thereof. Held that, as the 40*l.* a year was the only sum given to the daughter for her life, it was revoked by the codicil. [*Pilcher v. Hole*] - - - - - 208
11. Testator bequeathed his residuary estate to his grandchildren, and in

- case they should all die without leaving issue, then to the children of A. and their issue, in equal shares, or unto such of them as should prove their right within two years after the death of his grandchildren without issue. A. had five children, two of whom were living at the date of the will, and survived the testator; the others died before the date of the will, but two of them left issue. Held that all A.'s descendants who were living at the death of all the testator's grandchildren, without issue, or who should be born within the two years, would be entitled to participate in the residue. [*Clay v. Pennington*] - - - - - 370
12. Testator gave the residue of his estate to two trustees, in trust, out of the produce, to invest 4,000 *l.* in the funds, in trust for his granddaughter for her life, and after her death, for her children, and, on failure of children, he directed that the capital should fall into the residue. By a codicil reciting that he had, by his will, given to the two trustees, in trust for his granddaughter, 4,000 *l.* Five per Cents. standing in his name, and that he was desirous that such trust should be executed by three persons, he appointed another person to be a co-trustee and guardian of his granddaughter jointly with the two named in his will; and he directed that his said trustees *should transfer* the said stock to his granddaughter, free from all deductions. Held that the testator did not intend to give 4,000 *l.* stock to his granddaughter absolutely, but merely that the trusts declared by his will of the 4,000 *l.* should be performed by three persons instead of two. [*Barry v. Crundall*] 430.
13. Testator messuages; Penty Pa remainde; sons, in messuage, known by J. P. for his first a in the sul he menti Penty P By a codi had giver to J. L., Penty Pe J. P.; a that he ha estate," : revoked gave "th J. L. H in the wi revoked, Park in fee. [*P*]
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15. Testator leasehold hereditan rities for funds, go and all of estate an trust, to hold and dividends his money his said

- daughter for life, and, after her death, to stand possessed of his said freehold and leasehold estates, money in the funds, and all other his said real and personal estate, for the children of his daughter; and in default of such children, in trust to pay the rents of his said freehold and leasehold estates, and the dividends, interest and proceeds of his said stock in the funds, and other his said personal estate, to his nephews, for their lives, and after their deaths, in trust to stand possessed of his said freehold and leasehold estates, money in the funds, and other his said personal estate, for their children; and, in default of such children, he gave his said freehold and leasehold estates, stock in the public funds, and all other his said real and personal estate, to the corporation of S., in trust, as soon as conveniently might be after they should come into possession thereof, to sell his said freehold and leasehold estates, and also to sell, call in and convert into money his said stocks in the public funds, and all other his said personal estate, and to lend the same to certain persons, upon the terms therein mentioned. The testator, at the date of his will and at his death, was possessed of leasehold estates, turnpike securities, bank stock, and other personal estate. Held that the bequest to the trustees was a general residuary bequest, and that the leaseholds and bank stock ought to be sold, and the proceeds invested in Three per Cents.; and an inquiry was directed, whether the turnpike securities were real and permanent securities. [*Mills v. Mills*] - 501
16. The 3d section of 4 & 5 Will. 4, c. 29, enacts that, in certain cases, loans on real securities in Ireland, shall be made under the direction of the Court of Chancery or Exchequer in England, to be obtained in any cause upon petition in a summary way. Held that the concluding part of the section must be read thus: "in any cause, or upon petition in a summary way:" and that the proposed securities must be approved of by the master. [*Ex parte French*] - - - - - 510
17. Property agreed to be settled consisted of leaseholds in possession, and of money to be received on the husband's death, which was to be invested in the usual securities, and the trustees were to stand possessed of the leaseholds in trust for the husband for life, and, after his death, of one moiety of the leaseholds, stocks, funds and securities, for the wife for life, in case she survived her husband, and of the other moiety of the leaseholds, stocks, funds and securities, after the husband's death, and of the whole of the stocks, funds and securities, after the wife's death, in trust for the children. The wife died in the husband's lifetime. Held that there was a resulting trust, as to the leaseholds, for the husband, the settlor. [*Wilson v. Paul*] - - 620
18. Testatrix bequeathed, to her niece, her fixtures and her collection of coins (except those of the two last and present kings) in and about her dwelling-house: and all the residue of her estate, both real and personal (except as after otherwise disposed of), she gave to her grandchildren. And she directed that, from and after the day of her interment, all the property over which she had

any disposing power, in and about her dwelling-house (except what she had otherwise given), should belong to her niece and not be subject to diminution except by her own personal act and authority. After the testatrix's death, guineas, sovereigns, bank of England, country bank and promissory notes, and a mortgage, to a large amount in the whole, were found in her house: held that the niece (notwithstanding an annuity and a sum in gross were given to her by the will) was entitled to the guineas and sovereigns and also to the bank of England notes, but not to the country bank or promissory notes or the mortgage. [*Brooke v. Turner*] - - - 671

19. Testator gave a fund to trustees for his daughter for life, and after her death, in trust to transfer it to his niece, her executors, &c., in case she should be then unmarried, but in case she should be then married, in trust, to transfer the same to such persons as she, whether sole or married, should by deed or will appoint, and, in default of appointment, in trust to pay the dividends to her, for her separate use for life, and, subject to the trusts aforesaid, the capital to be in trust for her, her executors, &c. The niece married after the testator's death, and, during her coverture and in the lifetime of the testator's daughter, she made a will purporting to be an execution of the power given to her by the testator: held that the will was a good exercise of the power. [*Ashford v. Cafe*] - - - 641

See CONTINGENT REMAINDER.—LEGACY.—NEXT OF KIN.—PORTIONS.—REMOTENESS.—RESIDENCE IN ENGLAND.

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Certain issues
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CONTINGENT REMAINDER.

Testator devised a freehold estate to his wife for her widowhood, remainder to his nephew for life, remainder to the children of his nephew in fee as tenants in common, and, if there should be no child of his nephew living at his wife's death or second marriage, then over; and, by a codicil of even date with the will, he directed that neither his nephew nor any issue of his nephew should take a vested interest by virtue of his will, unless they should respectively attain 21; and that, in case of the death of any of such children under 21, their shares should go to the survivors, on their attaining 21. The nephew attained 21, and had five infant children living at the widow's death. Held that their interests were contingent on their attaining 21. [*Russel v. Buchanan*] - - - - - 628

CONTRACT.

See AGREEMENT.

CONVERSION.

A. and B., tenants in common of an estate, agreed to carry on the farming business in copartnership, and afterwards entered into copartnership as maltsters and biscuit bakers. From time to time, they made purchases of land with the partnership monies. Some of the lands so purchased were not conveyed to them, but others were conveyed, as to one moiety, to A., who was a bachelor, in fee, and, as to the other moiety, to B., who was married, and a trustee, to bar dower. The lands were used, solely, for farming and agricultural purposes, but all the receipts and payments in respect of

them, were entered in the partnership books and carried to the account of the partnership. The farming business was continued until A.'s death, but the malting and biscuit-baking had ceased several years before. Held that the lands were not converted into personalty. [*Randall v. Randall*] - - - - 271

COPARCENERS.

An advowson descended to four coparceners, A., B., C. and D., who agreed to present in succession, according to their seniority. When the third turn came, C. had died, leaving two co-heirs, E. and F., between whom the right to present was disputed. F. however presented, and, on the next avoidance, E. presented. Held that the presentations by E. and F., were to be counted, though they were usurpations on the rights of F. and D. respectively, and that, on the seventh avoidance, F. would be again entitled to present. [*Richards v. The Earl of Macclesfield*] - - - - - 257

COPARTNERS.

See PARTNERS.

COPIES.

See EVIDENCE.

COPYHOLDS.

See COVENANT, 2.

CORPORATION.

See AGREEMENT, 1, 2. 4.—COSTS, 5.

COSTS.

1. An executor paid interest on a legacy and died. The legatee filed a bill for payment of the principal

- against the executor's representative. The legatee afterwards presented a petition consenting to abandon his suit, and praying for liberty to prove for his legacy and *for the costs of his suit and of the petition* against the executor's estate, in a suit subsequently instituted by creditors of the executor. The prayer of the petition was granted. [*Turner v. Wardle*] - - - - - 80
2. A plaintiff who had misdescribed his residence ordered to give security for costs. [*Sandys v. Long*] 140
3. In taking the accounts of an intestate's estate, the plaintiffs, in consequence of the evasive and fraudulent conduct of the administratrix, had been under the necessity of employing an accountant. Before the hearing for further directions the administratrix was ordered to pay the costs of employing the accountant. [*Toner v. Thompson*] - 145
4. Where a decree directs the plaintiff to pay the costs of one of the defendants, and to have them over again from another defendant, and that defendant to pay the plaintiff's costs; the plaintiff is not at liberty to issue more than one subpoena or more than one attachment for both sets of costs. *Semble*. [*Chute v. Ross*] - - - - - 255
5. If a bill is ordered to be taken off the file on the ground that the plaintiffs assume to sue in a corporate character to which they are not entitled, the costs will be ordered to be paid by the town agent of the plaintiffs and not by their solicitor in the country. [*Corporation of Ruthin v. Adams*] - - - - 345
6. The plaintiff's solicitor, at the request of the defendant's solicitor, agreed to costs decreed, on plaintiff thereby. taxed, th his execu the suit Wilkins]
7. In a suit bill state defendants, A. admitted validity of issue was in Plaintiff elder brother daughter A. well to give his or in equity
8. A first mortgagee for the mortgaged premises, after hearing, The proceeds pay the interest, the defendant rected transferred to v. Harris
9. Certain and verdict the defendant trial; up that the plaintiff should be defendant trial should defendant pay the costs

less they thought fit to proceed to a new trial. [*Lambert v. Fisher*] 525
 See DEFENDANT, 3.—EXCEPTIONS, 1.
 PLAINTIFF.

COSTS OF TAXATION.
 See SOLICITOR AND CLIENT, 1.

COURT ROLLS.
 See STEWARD OF A MANOR.

COVENANT.

1. A father being seised of estates in tail and in fee, on his daughter's marriage, covenanted with two trustees, one of whom was his son, to pay an annuity to his daughter, out of the rents and income of his real and personal estates, and, by deed or will, to settle an estate of 200 *l.* a year, or, at his own election, 4,000 *l.* in lieu of it, on certain trusts for the benefit of his daughter and her husband and their issue. By a subsequent deed, the father and son, no other person being a party, agreed to suffer a recovery of the entailed estates and to sell them and also the fee simple estates, and that, out of the proceeds the father's debts (for some of which the son was surety) should be paid, and that certain sums should be taken by the father and son, for their own use, and that 4,000 *l.* should be paid and provision made for the annuity, pursuant to the covenant on the daughter's marriage. A recovery was accordingly suffered, and the estates were limited to the father and son in fee. The father and son afterwards agreed to abandon the last-mentioned agreement, and, in consideration of the son covenanting to pay the father's debts, the

estates were conveyed by them to the son in fee. The son afterwards mortgaged the estates comprised in the recovery. Held that the covenant for payment of the annuity, created a charge on the estates, and that, the mortgagee having had notice of that covenant, the premises were subject to the annuity; but that the covenant to settle the estate or 4,000 *l.* in lieu of it, created no lien or charge on any of the father's estates, and that the subsequent agreement between the father and son was merely voluntary and was fairly abandoned by them. [*Ravenshaw v. Hollier*] - - - - 3

2. A. sold and covenanted to surrender copyholds to B. and covenanted for the title in the usual manner. On the next day the surrender was made. Some time afterwards B. sold and covenanted to surrender the copyholds to C. and covenanted for the title as against his own acts only; and B. afterwards surrendered to C. Held that the original covenants were capable of being enforced against A., for that either they ran with the land, or C. was entitled to sue on them in B.'s name. [*Riddell v. Riddell*] - 529

See DEPOSIT.

CREDITOR'S SUIT.

An executor paid interest on a legacy and died. The legatee filed a bill for payment of the principal, against the executor's representative. The legatee afterwards presented a petition, consenting to abandon his suit and praying for liberty to prove, for his legacy and for the costs of his suit and of the petition, against the executor's estate, in a suit sub-

sequently instituted by creditors of the executor. The prayer of the petition was granted. [*Turner v. Wardle*] - - - - - 80

See **HEIR, 2.—PARTIES, 6.**

CUMULATIVE LEGACIES.

Testator, by his will, gave all his property to his wife, absolutely. By a subsequent incomplete testamentary paper, he gave all his property to his wife and two other persons in trust to sell and pay the interest of the proceeds to his wife for her life, and, after her decease, to dispose of the principal to the purposes after mentioned. The testator then gave several legacies and annuities, and directed that, after the death and failure of issue of one of the annuitants, the annuity should be paid to his residuary legatee, but he did not name any. In another testamentary paper the testator gave legacies and annuities to the legatees and annuitants named in the former paper, and also to other persons. Held that the three papers formed, together, the testator's will: that the bequest to the wife in the first paper, was not revoked except so far as was necessary to provide for the legacies and annuities: and that the legacies given by the second and third papers, were single and not cumulative. [*Brown v. Ferriss*] - - - - - 549

DEBT.

Testator subscribed for 20 shares of 100*l.* each in a projected railroad, and paid 5*l.* on each share, and covenanted to pay the remainder when called on. He bequeathed his personal estate to his widow,

and devotes to and pay mortgage estates w and all o be due fr he died mium, an them ha years afte the railro testator's onerated was enti instalmer estates.

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DEBTOR.

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See **DEBT.**

See **COVERS.**

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- plemental answer for the purpose of stating that fact. [*Tidswell v. Bowyer*] - - - - - 64
2. A defendant cannot object to a cause being heard on the ground that the plaintiff is in contempt. [*Ricketts v. Morington*] - - 200
3. A bill was filed in consequence of a claim to a fund made by a defendant. The defendant, in his answer, disclaimed all right to the fund, but stated certain facts as the ground for his not being ordered to pay the costs of the suit. The plaintiffs entered into evidence, by which they falsified those statements. The Court held that they were justified in so doing and ordered the defendant to pay the costs of the suit. [*Deacon v. Deacon*] - - - - 378
- See ANSWER.—CONTEMPT.—COSTS, 7.
—EXHIBITS.—PRACTICE, 5.—PROCESS.
- DEMURRER.
1. The word *order*, without the word *decree*, in the prayer of process to a bill of discovery, does not render the bill demurrable. [*Baker v. Bramah*] - - - - - 17
2. A. bequeathed a reversionary interest expectant on his wife's death, in a sum of stock, to B. B. bequeathed it to C. and C. bequeathed it to D., who, on the death of A.'s wife, filed a bill against the trustees to have the stock transferred to him, alleging that the executors of A. and B. and C. had successively assented to the bequests. Held that the executors were not necessary parties. [*Smith v. Brooksbank*] 18
3. A bill by an insolvent, to set aside an assignment, by his assignee, of his interest under his father's will, stating a special case of collusion between the assignee and the executors, is not demurrable. [*Barton v. Jayne*] - - - - - 24
4. J. D. founded a school and gave lands, to a guild or fraternity, for providing a master for the school. Some years afterwards, he gave lands to a college, on condition of their maintaining five scholars to be chosen, by the guild, from the school: and he directed that the master of the school should be chosen and removed (when necessary) by the guild, with the advice of the master and fellows of the college. By an act of parliament, the guild was dissolved, and the electing of the scholars to be sent to the college, was given to the schoolmaster and the vicar and churchwardens of the parish; and the appointing of the school-master was given to the college, and, on their default, to the Archbishop of York. Held that the school and the scholarships, were distinct foundations; and, therefore, that an information relating to abuses in both of them was multifarious, and that the archbishop ought to have been made a party to it. [*Attorney-General v. St. John's College*] - - - - - 241
5. Defendant demurred to the bill, within the 12 days allowed by the 10th of Lord Brougham's Orders, but after the plaintiff had obtained the common injunction. Held not to be irregular. [*Poole v. Marsh*] 521
6. Some of the next of kin of an intestate filed a bill against the other next of kin, one of whom also was the administrator and

claimed to be the heir of the intestate, alleging that the intestate had entered into contracts for the sale of parts of his estates, which were still incomplete, and that the heir and administrator had agreed with the other next of kin, that, whether the contracts should or should not be completed, the estates should be considered as personalty; and praying for an account of the rents received by the heir and administrator (who was in possession) and for a receiver. A demurrer, by the heir and administrator, because the purchasers were not parties, was allowed. [*Lumsden v. Fraser*] 555

7. Demurrer allowed to a bill for the delivery up of a bill of exchange, the amount of which the defendant had recovered at law and had received from the plaintiff. [*Threlfall v. Lunt*] - - - - - 627

See COLLUSION, 1, 2.

DEMURRER OF PAROL.

In a decree for a sale, against the infant heir of an estate subject to an equitable mortgage, the infant ought not to be allowed six months after coming of age to show cause against the decree. But, in a decree for a foreclosure, the six months ought to be allowed. [*Scholefield v. Heafield*] - - 667

DEPOSIT.

The depositary of a lease for securing a debt, is liable to the rent and covenants, although he has not taken possession of the premises. [*Flight v. Bentley*] - - - - 149

See EXCEPTIONS, 1.

DEPOSITIONS.

See EVIDENCE, 1, 2. 5.

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in ascertaining those opinions, the state of the law when the meeting-house was founded, is to be regarded: as the Court will intend that the founders did not mean any doctrines to be taught, which were then illegal. [*Attorney-General v. Pearson*] - - - - - 290

2. The management of the affairs of a dissenting-chapel was vested in the communicants. The congregation being dissatisfied with their minister, held a meeting, at which they resolved that he should be recommended to resign. Neither the minister, nor a majority of the communicants was present at the meeting: but the resolution was afterwards signed by a majority of them, and communicated to the minister. Held that the resolution was tantamount to a dismissal, although it was not come to at a meeting, at which a majority of the communicants was present. [*Attorney-General v. Aked and Others*] - - 321

DOCUMENTS.

See EXHIBITS.

DOMICILE.

By the law of Holland, the surviving parent is entitled to the income of the children's property, until they attain 18. By a judicial compromise of a suit in Holland, two infant children, who were domiciled in this country, were adjudged to be entitled to one-fourth of their deceased mother's personal estate. Held that their father was not entitled to the income of their property until they attained 18. [*Gambier v. Gambier*] - - - - - 263

See DEFENDANT, 1.

VOL. VII.

DONATIO MORTIS CAUSA.

The obligee in a bond, gave it to her niece, and, afterwards, in her last illness and five days before her death, signed a memorandum, purporting to be an immediate and absolute assignment of the bond, to her niece. Held that the transaction could not be considered as a *donatio mortis causa*, as there was no evidence to show at what time or under what circumstances the bond first came into the niece's possession, and as the assignment was immediate and unconditional. [*Edwards v. Jones*] 325

ECCLESIASTICAL CORPORATION.

1. Time is, to a great extent, of the essence of a contract entered into with an ecclesiastical corporation. Therefore, where A. agreed to take a concurrent lease of a dean and chapter and to pay the fine in January, but was not ready with the money in March following, a bill filed by him for a specific performance, was dismissed with costs. [*Carter v. Dean and Chapter of Ely*] 211

2. An entry, in the books of a corporation, of the terms of an agreement entered into by them, does not bind them, although it is signed by a majority of the members. [*Ibid.*]

ECCLESIASTICAL COURT.

See INJUNCTION.

ECCLESIASTICAL LEASE.

See LEASE.

EQUITABLE MORTGAGE.

1. The depositary of a lease for securing a debt, is liable to the rent and

movements, although, he has not taken possession of the premises.

[*Fryer v. Bentley*] - - - - 149

2. If an equitable mortgagee enters into the receipt of the rents of the mortgaged estate, such receipt is, *prima facie*, a payment within the meaning of the proviso in the Statute of Limitations. [*Brookhouse v. Jessup*] - - - - 428

3. An equitable mortgagee, if the mortgagor is dead, is entitled to have the estate sold, and the proceeds applied in payment of his debt, and to stand as a creditor, for the balance (if any) on the general assets of the mortgagor. *See* *Simble*. [*Ibid.*]

See DEEDS AND PROBATE.

EVIDENCE.

1. The evidence of an interested witness may be read in a suit in equity, under 3 & 4 W. 4. c. 42. s. 36 & 37. [*Wheat v. Graham*] - - - - 82

2. The depositions of such of the witnesses in a cause as had died, were ordered to be read at the trial of an issue in the cause. The plaintiff afterwards died, having appointed A. one of his witnesses, his executor. A. revived the suit and his name was substituted, for the plaintiff's, in the issue. Ordered that A.'s depositions should be read at the trial. [*Andrews v. Lady Beauchamp*] - - - - 65

3. An inscription, giving an account of the Moreton family, on the wall of a chancel in a church, called the Moreton chancel, in which some of the family (who had resided and had property in the parish) were buried, was held good evidence of pedigree: and, the inscription having been

effaced had been afterwards received (but by receipt)

4. A. testified his belief that B. and a trust him by such evidence the parties

5. In an issue, evidence was

1. Defendant examined and witness the deposition order

2. When a separate petition

3. Person who had the office,

report, must present a petition stating their objections and praying for leave to except. [*Taylor v. D'Egville*] - - - - - 445

EXECUTOR AND ADMINISTRATOR.

1. Probate by one executor enures to the co-executors. [*Watkins v. Brent*] 512
2. Although the Court will appoint a receiver on account of the pendency of a suit in the Ecclesiastical Court respecting the validity of a will, it will not, on that account alone, order the person named as executor, to pay into Court money in his hands belonging to the deceased's estate. [*Reed v. Harris*] - - - - - 639

See ADMINISTRATION.—ADMINISTRATOR.—BREACH OF TRUST.—CREDITOR'S SUIT.—DEMURRE, 2.

EXECUTOR DE SON TORT.

Payments made by an administrator *de son tort*, pending a suit for an account of an intestate's estate, to a person who took out administration after the institution of the suit and was thereupon made a co-defendant, will not be allowed. [*Layfield v. Layfield*] - - - - - 172

EXHIBITS.

If a plaintiff has proved a document in a defendant's possession, the latter must produce it at the hearing, although he has not been served with an order to that effect. [*Wheat v. Graham*] - - - - - 61

EXONERATION.

See CONSTRUCTION, 3.—RAILROAD SHARES.

EXPECTANT HEIR.

See REVERSION.

FATHER AND SON.

See COVENANT, 1.—DOMICILE.—PARENT AND CHILD.

FEME COVERTE.

1. A married woman, having separate property, employed a solicitor, and undertook to pay him out of her separate estate. By the decree in a suit instituted by the solicitor, his bills were ordered to be paid out of the separate property, and it was referred to the Master to tax them. *Semble* that the solicitor is entitled to the costs of taxation, though more than one-sixth was taken off. [*Murray v. Barlee*] - - - - 194
2. The Court will take the consent of a married woman, though a minor, to the payment to her husband, of a sum to which she is entitled. [*Gullin v. Gullin*] - - - - - 236
3. Part of the capital of a fund in Court, belonging to a married woman, who was deranged and had been deserted by her husband, ordered to be applied for her maintenance. [*Peters v. Grote*] - 238

FORECLOSURE.

See INFANT, 6.—MORTGAGOR AND MORTGAGEE, 1. 5.

FOUR-DAY ORDER.

The four-day order, if obtained before the filing of the certificate that the defendant has made default in putting in his examination, is irregular. [*Frishy v. Stafford*] - - - - 365

FRAUD.

1. The principle upon which courts of equity relieve against securities taken by an attorney from his client,

apply to all cases in which confidence is reposed by one party in the other: therefore, the Court will relieve against an agreement taken by a medical adviser from an aged patient, by which the former, in consideration of his past and future services, was to be paid 25,000 *l.* after the death of the latter. The Court was also of opinion that the agreement was void at law: as it was an inducement to the medical adviser to accelerate his patient's death. [*Dent v. Bennett*] - - 539

2. Testator gave his real and personal estate to his wife, absolutely, "having a perfect confidence she will act up to those views which I have communicated to her in the ultimate disposal of my property after her decease." After the death of the wife, intestate, a bill was filed, by two natural children of the testator, against his heir and next of kin, and also against his wife's heir and administrator, alleging that the testator, at the time of making his will, desired his wife to give the whole of his property, after her death, to the plaintiffs, and that she promised and undertook so to do. Held that, if the plaintiffs had proved that allegation, a trust would have been created, as to the whole of the property, in favour of the plaintiffs. [*Podmore v. Gunning*] - - - 644

See ACCOUNTANT.—APPOINTMENT.—
REVERSION, 3, 4.

GIFT.

1. The obligee in a bond, gave it to her niece, and, afterwards, in her last illness, and five days before her death, signed a memorandum, pur-

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See INF.

HUSBAND AND WIFE.

1. Whether a bill by the executors of a married woman, against her husband, to recover arrears of alimony due at her death, is sustainable. *Qu. [Stones v. Cooke]* - - - 22
2. Husband and wife ought not to join as co-plaintiffs, in a suit relating to the wife's separate property, but the bill ought to be filed by the wife alone, by her next friend. *[Sigel v. Phelps]* - - - - 239

See CONSTRUCTION, 6.—FEME CO-VERTE, 2, 3.—NEXT OF KIN.

INFANT.

1. A co-plaintiff who was an infant when the suit was instituted, moved, on coming of age, that his name might be struck out of the bill. Motion granted. *[Acres v. Little]* 138
2. An infant allowed to be placed at the University of Dublin, under special circumstances. *[Letham v. Hall]* - - - - - 141
3. A messenger had been ordered to bring an infant defendant into Court, to have a guardian assigned for putting in his answer. The messenger's return stated that the infant was secreted by his mother. The Vice-Chancellor ordered the serjeant-at-arms to go, and said that on the return of the serjeant-at-arms, he would order the senior six clerk to be appointed the guardian without the infant being produced. *[Steed v. Calley]* - - - - 148
4. A bill filed on behalf of an infant, ordered to be taken off the file, with costs to be paid by the next friend, he being a person in low circum-

stances, and of immoral character, and there being reason to suppose that he had instituted the suit from spite against one of the defendants. *[Walker v. Else]* - - - - 234

5. The Court will take the consent of a married woman, though a minor, to the payment to her husband, of a sum to which she is entitled. *[Gullin v. Gullin]* - - - - 236
6. In a decree for a sale against the infant heir of an estate subject to an equitable mortgage, the infant ought not to be allowed six months after coming of age to show cause against the decree. But in a decree for a foreclosure, the six months ought to be allowed. *[Scholefield v. Heafield]* - - - - - 669

See DOMICILE.—NEXT FRIEND.

INFORMATION.

See DEMURRER, 4.

INJUNCTION.

1. The affidavit in support of a motion to extend the common injunction, must be made by the plaintiff himself, unless a sufficient reason is assigned for its not being so made. *[Spalding v. Keely]* - - - - 377
2. The plaintiff in an interpleading suit, first obtained the common injunction, and then moved to extend it to stay trial. Motion refused. *[Moore v. Usher]* - - - - 383
3. The common injunction stays proceedings at law till answer or further order: the injunction in an interpleading suit, stays them till further order. - - - - - *[Ibid.]*
4. A. and B. carried on the business of a pencil-maker, under the firm of

A. & L. A. died, and B. carried on the business, under the firm of B. & Co., successors to A. & L. A.'s executor, having commenced the same business, under the firm of A. & L., an injunction was granted to restrain him from using that firm, until the right should have been tried at law. [*Lewis v. Langdon*]

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5. Although probate or letters of administration may have been granted, yet, if a sufficient case is made for disputing their validity, and a suit has been commenced, in the Ecclesiastical Court, for the purpose of having them revoked, this Court will protect the property of the deceased, by granting an injunction and receiver pending the litigation in the Ecclesiastical Court [*Watkins v. Brent*] - - - - - 512

6. The Court will not alter its practice as to granting injunctions, notwithstanding the greater rapidity of proceedings at law in consequence of the new rules of 1834. [*Bailey v. Weston*] - - - - - 666

See AFFIDAVIT.

INSOLVENT DEBTOR.

A bill by an insolvent, to set aside an assignment, by his assignee, of his interest under his father's will, and stating a special case of collusion between the assignee and the executors, is not demurrable. [*Barton v. Jayne*] - - - - - 24

INSUFFICIENCY.

An order for referring an answer for insufficiency, must be served as well as obtained before the expiration of the six days allowed by the 5th of

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iron, in his books, to C., and informed C., by letter, that he held the iron transferred by A. at C's disposal. Afterwards D. demanded the iron of B., stating that it was in the possession of A. as agent for him, and that A. had no power to deal with it as he had done. B., in consequence of C. and D. having brought actions of trover against him, for the iron, filed a bill of interpleader against them. Held that, as the letter had given C. a right against B., independent of his character of depositary, it was not a case of interpleader. [*Crawshaw v. Thornton*] - - - - - 391

JURISDICTION.

The defendant had been taken under a *Ne exeat*, which, afterwards, was ordered to be discharged. After the order was made, but before the defendant was set at liberty, the plaintiffs arrested him at law, for the same cause of suit. The Vice-Chancellor was of opinion that he had no jurisdiction to discharge the defendant from the arrest. [*Walker v. Christian*] - - - - - 367

See INSOLVENT DEBTOR.—RECEIVER.
—STEWARD OF A MANOR.

LACHES.

A. having a claim on property which he knew was the subject of a reference between C. and D., suffered the award to be made, without bringing forward his claim. Held that he was bound by the award. [*Govett v. Richmond*] - - - - - 1

LANDLORD AND TENANT.

The assignee of a reversion is not en-

titled, under 32 Henry 8, c. 34, to arrears of rent which became due prior to the assignment. [*Flight v. Bentley*] - - - - - 149

See DEPOSIT.

LEASE.

A lease of houses in London for 21 years from the date, granted by a vicar during the existence of a lease for 40 years, but which had less than three years to run, is valid. [*Vivian v. Blomberg*] - - - - - 548

See DEPOSIT.

LEGACY.

Testator gave a real estate and a sum of stock, to A. for her life, and, after her death, to his brother, absolutely: and he gave legacies which he directed to be paid as soon as convenient after his death, to his nephews and nieces, and the residue of his property to his brother absolutely. The brother having died, the testator, by a codicil reciting that fact and that thereby the devises and bequests to his brother had lapsed, gave an annuity to his brother's widow, and directed his trustees to pay the income of the residue of his personal estate to A. for life, and gave to her all his real estates for life, and, after her death, to his trustees in trust to sell, and the proceeds to fall into his personal estate: he then gave 10,000*l.* to each of his nieces, in addition to the legacies given to them by the will, and directed that that sum for each of them, should be held by his trustees for their separate use: and he gave all the clear residue of his estate, after providing for the beforementioned legacies and also

those given by his will, to his nephews. Held that the legacies given to the nieces by the codicil, were not payable till after A.'s death. [*Overend v. Gurney*] - 128

See CONSTRUCTION, 18. — CUMULATIVE LEGACIES. — LEGACY DUTY. — RESIDENCE IN ENGLAND. — WILL, 1, 2.

LEGACY-DUTY.

1. Testator, by his will, gave an annuity to his grandson, and directed his executors to pay the legacy-duty on all the legacies and annuities given by his will. By a codicil, he gave an annuity to his grandson in lieu of the annuity given by his will. Held that the annuity given by the codicil, was free from legacy-duty. [*The Earl of Shaftesbury v. The Duke of Marlborough*] - 237
2. Testatrix gave to trustees such a sum of money as that the annual produce thereof, when invested in the funds, would produce the clear yearly sum of 500*l.*, and she declared trusts of the fund for some of her relations and other persons, in succession, some of them not being ascertained at her death. Held that the fund was not exempted from legacy duty. [*Sanders v. Kiddell*] - - - - - 536

LEGATEE.

See CREDITOR'S SUIT.

LEGITIMACY.

See EVIDENCE, 4.

LESSOR AND LESSEE.

See DEPOSIT. — LANDLORD AND TENANT.

1. If a vendor purchases a part of it, the co-trustee, he is liable for the purchase-money. [*Wakefield*]

2. Where a testator gives the whole of his real estate as his possession, and the testator's personal estate is retained

See BANK

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1. Testator's personal estate is a trust to maintain children by him. Held that the testator is entitled to a share, for

- nance, notwithstanding he might be of ability to maintain them. [*Hawkins v. Watts*] - - - 199
2. Part of the capital of a fund in Court, belonging to a married woman, who was deranged and had been deserted by her husband, ordered to be applied for her maintenance. [*Peters v. Grote*] - - 238
3. A. provided a fund for defraying the expense of obtaining an Act of Parliament to dissolve the marriage of B. and C. who was A.'s illegitimate daughter. Held that the transaction was not illegal. [*Moore v. Usher*] - - - - - 384
4. The shares of children in a legacy, were contingent on the sons attaining 24 or dying under that age leaving issue, and on the daughters attaining 24 or marrying; but the legacy was not given over in the event of no child acquiring a vested interest. The Court refused to order maintenance for the children, unless the testator's next of kin would consent. [*Cannings v. Flower*] 523

MARRIAGE SETTLEMENT.

See SETTLEMENT.

MEETING HOUSE.

See DISSENTING MEETING HOUSE.

MONUMENTAL INSCRIPTION.

See EVIDENCE, 3.

MORTGAGE.

See CONSTRUCTION, 18.

MORTGAGOR AND MORTGAGEE.

1. Where money is secured by a mortgage for a term, and by a trust for

sale of the fee, the mortgagee, if he files a bill praying for a sale only, is not entitled to foreclose the fee, nor, unless he amends his bill, to foreclose the term. [*Kerrick v. Saffery*] - - - - - 317

2. A mortgagor, who had become bankrupt, was held not to be a necessary party to the suit [*Ibid.*]
3. If the plaintiff in a suit for redemption, does not pay the principal and interest at the time appointed, he will not be allowed to redeem, although, before the motion to dismiss is made, he has tendered the amount reported due with the subsequent interest. [*Faulkner v. Bolton*] - - - - - 319
4. A mortgagee purchased part of the mortgaged estate. His principal and interest, calculated up to the 24th of March, exceeded the purchase-money. He was let into possession from the preceding Christmas. [*Bates v. Bonnor*] - - 427
5. A first mortgagee filed a bill against the mortgagor and subsequent mortgagees for a foreclosure, but, at the hearing, he consented to a sale. The proceeds being insufficient to pay the plaintiff his principal and interest, the Court refused to give the defendants their costs, and directed the whole fund to be transferred to the plaintiff. [*Upperton v. Harrison*] - - - - - 444
6. Where the time fixed, by the decree in a foreclosure suit, for payment of principal, interest and costs, is enlarged, the Court will direct subsequent interest to be computed on the aggregate sum found due

for principal, interest and costs. assets, ar
 [*Brace v. Wharton*] - - - 483 be redee
 See COLLUSION.—INFANT, 6. mortgage
 allowed.

MULTIFARIOUSNESS.

1. J. D. founded a school and gave lands, to a guild or fraternity for providing a master for the school. Some years afterwards, he gave lands to a college on condition of their maintaining five scholars, to be chosen by the guild from the school: and he directed that the master of the school should be chosen and removed (when necessary) by the guild, with the advice of the master and fellows of the college. By an Act of Parliament, the guild was dissolved, and the electing of the scholars to be sent to the college was given to the schoolmaster and the vicar and churchwardens of the parish; and the appointing of the master was given to the college, and, on their default, to the Archbishop of York. Held that the school and the scholarships were distinct foundations; and, therefore that an information relating to abuses in both of them, was multifarious, and that the archbishop ought to have been made a party to it. [*Attorney-General v. St. John's College*] - - - 241
2. Devisees and legatees filed a bill against the trustees and executors of the will and a mortgagee in possession of part of the estates, alleging that the trustees and executors colluding with the mortgagee, refused to make him account for the rents which he had received or to redeem the mortgage, and praying for an account of the testator's
3. A bill interested in the exec estate, though it the co-de fined to
4. By a husband for life, children was prov appointe together of the s apply, a viving p children' their ma riage, th fund in (and with his will to A. B. dren, wil tenance, his exec wife, the A bill wi children A. B. C. of the t carried i C. demu The dei [*Campbe*

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NEW ORDERS.

1. Defendant took one, general exception to a report finding his examination insufficient. The Court held the report to be right in part and wrong in part and overruled the exception and gave the plaintiff the deposit; but, under the 41st Order of 1831, refused to make any order as to costs. [*Ward v. Fitzhugh*] - - - - - 42
2. Under the 17th Order of 1831 a plaintiff, though he does not want a commission, is not at liberty to give a rule to pass publication until the expiration of three weeks from the service of the subpoena to rejoin. [*Flight v. Jones*] - - 256
3. An order for referring an answer for insufficiency, must be served as well as obtained before the expiration of the six days allowed by the 5th of Lord Lyndhurst's Orders. [*Peace v. Hodgson*] - - - - 347
4. The defendant, before replication, served a notice of motion to dismiss. On the next day, plaintiff replied, and the motion was not made, and, consequently, plaintiff did not undertake to speed. No subpoena to rejoin was served, and the defendant again moved to dismiss. Held that neither the 16th nor the 17th Order applied, but that the case was governed by the old practice. [*Earl Ferrers v. Shirley*] - - 484
5. Defendant demurred to the bill, within the 12 days allowed by the 10th of Lord Brougham's Orders, but after the plaintiff had obtained the common injunction. Held not to be irregular. [*Poole v. Marsh*] - - - - - 521

NEW TRIAL.

In moving for a new trial of an issue, either party may refer to evidence given in the cause, though it was not used at the trial. [*Slaney v. Wade*] - - - - - 618

See CONSTRUCTION OF ORDER.

NEXT FRIEND.

A bill filed on behalf of an infant, ordered to be taken off the file, with costs to be paid by the next friend, he being a person in low circumstances, and of immoral character, and there being reason to suppose that he had instituted the suit from spite against one of the defendants. [*Walker v. Else*] - - - - - 234

NEXT OF KIN.

By a marriage settlement, a fund, the property of the wife, was settled on her and her husband and their issue, and in default of issue, on the wife's next of kin. The wife, who was illegitimate, died without issue, and her husband administered to her. Held that the Crown was not entitled to the fund; but that it belonged to the husband as administrator to his wife. [*Hawkins v. Hawkins*] - - - - - 173

NOTICE.

See LIEN.

ORDER AND DISPOSITION.

A., a merchant in Liverpool, being indebted to B., a merchant in London, on the 11th of April, sent, at B.'s request, a written order to C. his agent in Bahia, to deliver to B.'s agent there, all the goods belonging to A. in his, C.'s hands. On the 23d

of May, A. committed an act of bankruptcy, on which a commission issued. On account of the distance of Bahia from England, the order did not reach C. till after the 23d of May. Held that B. had a lien on the goods for his debt. [*Burn v. Carvalho*] - - - - - 109

ORDERS.

See CONSTRUCTION OF ORDER.—
NEW ORDERS.—PRO CONFESSO, 2.

OUTLAWRY.

A creditor, who has obtained a judgment in outlawry against his debtor, is not entitled to the aid of a court of equity in obtaining possession of the debtor's estate until he has obtained a grant of it from the Crown. [*Cuddon v. Hubert*] - - - - 485

OUTSTANDING TERMS.

The bill stated that A., the plaintiff's cousin, died intestate and without issue, leaving the plaintiff, and B., a defendant, his co-heirs: that C., the other defendant, had entered into possession of A.'s estates under an alleged will: that plaintiff and B. had brought an ejectment against C. on their joint and several demises: that there were outstanding terms which C. threatened to set up, and which would defeat the ejectment, and that B. refused to join in the suit. The bill prayed for a discovery and production of the deeds, and to restrain the setting up of the terms. Held that the allegation of outstanding terms was sufficient; but that the title by descent was not stated with sufficient particularity. *Semble*, that B.'s not joining in the

suit was also fatal to the bill. [*Baker v. Harwood*] - - - - - 373

PARENT AND CHILD.

Testator gave a share of his personal estate to his son-in-law, in trust to apply the same for the maintenance and use of his children by the testator's daughter. Held that the son-in-law was entitled to apply the interest of the share, for his children's maintenance, notwithstanding he might be of ability to maintain them. [*Hawkins v. Watts*] 199

See COVENANT, 1.—DOMICILE.

PAROL, DEMURRER OF.

See DEMURRER OF PAROL.

PARTIES.

1. A. bequeathed a reversionary interest expectant on his wife's death, in a sum of stock, to B. B. bequeathed it to C. and C. bequeathed it to D., who, on the death of A.'s wife, filed a bill against the trustees to have the stock transferred to him, alleging that the executors of A. and B. and C. had successively assented to the bequests. Held that the executors were not necessary parties. [*Smith v. Brooksbank*] - - - 18
2. Husband and wife ought not to join as co-plaintiffs, in a suit relating to the wife's separate property, but the bill ought to be filed by the wife alone, by her next friend. [*Sigel v. Phelps*] - - - - - 239
3. A. was entitled to rents up to a certain time, and B. was entitled to them subsequently. B. filed a bill for an account of the rents for the whole period, alleging that he had satisfied all A.'s claims, out of his

- own monies, but did not make B. a party. Held that B. was a necessary party. [*Attorney-General v. Pearson*] - - - - - 290
4. Where there are no descended estates, the heir of a deceased debtor is not a necessary party to a suit instituted under 3 & 4 Will. 4, c. 104, which makes real estates assets for the payment of simple contract debts. [*Weeks v. Evans*] - - - 546
5. Some of the next of kin of an intestate filed a bill against the other next of kin, one of whom also was the administrator and claimed to be the heir of the intestate, alleging that the intestate had entered into contracts for the sale of parts of his estates, which were still incomplete, and that the heir and administrator had agreed with the other next of kin, that, whether the contracts should or should not be completed, the estates should be considered as personalty; and praying for an account of the rents received by the heir and administrator (who was in possession) and for a receiver. A demurrer, by the heir and administrator, because the purchasers were not parties, was allowed. [*Lumsden v. Fraser*] - - - - - 555
6. A. and B. deposited with a firm of which A. was a member, the title deeds of an estate of which they were joint owners, as a security for a debt due from them to the firm. A. died intestate. The surviving partners in the firm filed a bill, against his heir and B., for a sale of the estate. Held that A.'s personal representative ought to have been made a party to the suit. [*Scholefield v. Heafield*] - - - - - 667
- See COLLUSION.—DEMURREE, 4.—
MORTGAGOR AND MORTGAGEE, 1, 2.
—PLEA AND PLEADING.
- PARTNERS & PARTNERSHIP.
1. A. a partner in a house of agency in India, died, having, by his will, directed his estate to be called in, and invested on certain trusts, and appointed two of his co-partners his executors. They, however, suffered his share in the partnership to remain in the house. After A.'s death, B. and C. were admitted as partners, and they knew that A.'s share was remaining in the house, and that it was subject to the trusts of his will. They afterwards retired, and other partners were admitted. The house ultimately failed. Held that B. and C. were not responsible for the breach of trust committed by their copartners, the executors. [*Twyford v. Trail*] - - - - 92
2. A. and B. carried on the business of a pencil maker, under the firm of A. & L. A. died, and B. carried on the business, under the firm of B. & Co., successors to A. & L. A.'s executor, having commenced the same business, under the firm of A. & L., an injunction was granted to restrain him from using that firm, until the right should have been tried at law. [*Lewis v. Langdon*] - - - - - 421
3. A. and B. deposited with a firm of which A. was a member, the title deeds of an estate, of which they were joint owners, as a security for a debt due from them to the firm. A. died intestate. The surviving partners filed a bill, against his heir and B., for a sale of the estate. Held that A.'s personal representa-

- tive ought to have been made a party to the suit. [*Scholefield v. Heafield*] - - - - - 667
4. A. and B. tenants in common of an estate, agreed to carry on the farming business in co-partnership, and afterwards entered into co-partnership as maltsters and biscuit bakers. From time to time, they made purchases of land with the partnership monies. Some of the lands so purchased were not conveyed to them, but others were conveyed, as to one moiety, to A., who was a bachelor, in fee, and, as to the other moiety, to B. who was married, and a trustee to bar dower. The lands were used, solely, for farming and agricultural purposes, but all the receipts and payments in respect of them, were entered in the partnership-books and carried to the account of the partnership. The farming business was continued until A.'s death, but the malting and biscuit-baking had ceased several years before. Held that the lands were not converted into personality. [*Randall v. Randall*] 271
- PAYMENT OF MONEY INTO COURT.**
- Although the Court will appoint a receiver on account of the pendency of a suit in the Ecclesiastical Court, respecting the validity of a will, it will not, on that account alone, order the person named as executor to pay into Court, money in his hands belonging to the deceased's estate. [*Reed v. Harris*] - 639
- See PRACTICE, 2.*
- PEDIGREE.**
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that there were outstanding terms which C. threatened to set up, and which would defeat the ejectment, and that B. refused to join in the suit. The bill prayed for a discovery and production of deeds, and to restrain the setting up of the terms. Held that the allegation of outstanding terms was sufficient; but that the title by descent was not stated with sufficient particularity. *Semble*, that B.'s not joining in the suit was also fatal to the bill. [*Baker v. Harwood*] - - - 373

2. By a marriage settlement, the husband settled a fund on the wife, for life, and, after her death, on the children of the marriage; and it was provided that the persons to be appointed their guardians, should, together with A. and B. the trustees of the settlement, have power to apply, after the death of the surviving parent, the interest of the children's presumptive portions, for their maintenance. After the marriage, the husband vested another fund in C. and D., on similar trusts, and with a like proviso: and, by his will, he bequeathed other funds to A. B. and C. in trust for his children, with a proviso for their maintenance, and appointed A. B. and C. his executors and, jointly with his wife, the guardians of his children. A bill was filed by the widow and children (who were infants) against A. B. C. and D. to have the trusts of the two deeds and of the will carried into execution. A. B. and C. demurred for multifariousness. The demurrer was over-ruled. [*Campbell v. Mackay*] - - - 564

See COLLUSION.—HEIR, 2.—PARTIES, 1, 2, 6.

PORCTIONS.

By a marriage settlement, an estate was limited to the husband for life, remainder to the wife for life, remainder to trustees during their lives, to preserve, &c., remainder to the same trustees for 500 years, remainder to the sons of the marriage in tail. The trusts of the term were, in case the husband should die leaving issue, by the wife, a son who should attain 21, and one or more other children, to raise, after the deaths of the husband and wife and the commencement of the term, but not before, unless the husband should so direct, (there being a son then living) a certain sum for the portions of such other children, share and share alike, and to survive to the survivors and survivor of them: the shares to be paid to them on attaining 21 (if sons) or 18 or marrying (if daughters) which should first happen, in case it should so happen, after the deaths of the husband and wife, otherwise, within three months after the death of the survivor of the husband and wife. Provided that if the husband should, in exercise of a power given to him by the settlement, appoint the estate to a younger son, then the elder son should be entitled to a share of the sum to be raised for portions. Provided also that, until the portions should become payable, the trustees should, out of the rents of the premises comprised in the term, and after the commencement thereof, maintain the children: and that the husband and wife, during their respective lives, and the trustees, during the joint lives of the husband and wife and during the term, should have power to lease the premises

for 14 years. There was issue of the marriage a son and three daughters, all of whom attained the required age, and all but one daughter survived the husband and wife. Held that that daughter was not entitled to a portion. [*Whatford v. Moore*] - - - - - 574

POWER.

Testator gave a fund to trustees for his daughter for life, and, after her death in trust to transfer it to his niece, her executors, &c. in case she should be then unmarried; but in case she should be then married, in trust to transfer the same to such persons as she, whether sole or married, should by deed or will appoint, and in default of appointment in trust to pay the dividends to her, for her separate use, for life, and subject to the trusts aforesaid, the capital to be in trust for her, her executors, &c. The niece married after the testator's death; and, during her coverture and in the lifetime of the testator's daughter, she made a will purporting to be an execution of the power given to her by the testator. Held that the will was a good exercise of the power. [*Ashford v. Cafe*] - - - - - 641

See APPOINTMENT.—PRACTICE, 17.

POWER OF SALE.

A reversion in fee expectant on a life estate, was settled in strict settlement, and the trustees were empowered, at any time thereafter, with the consent of the tenant for life under the settlement, to sell or exchange the lands for other lands in fee in possession. The tenant for life

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- be at liberty to put in his answer. Motion refused, although the defendant did not mean to enter into evidence; and, the case against him being the same as against the other defendants, he consented to the evidence which had been taken, being read against him. [*Carr v. Pauletti*] - - - - - 142
6. The order for taking a bill *pro confesso*, takes effect from the time when it is pronounced; and the Court will not discharge the order, although the answer is filed before the rising of the Court on the day on which the order is made. [*James v. Cresswicke*] - - - - - 143
7. Where a party to a suit objects to a separate report, he must except to it in the usual manner, and not by petition. [*Drever v. Maudesley*] - - - - - 240
8. Where a decree directs the plaintiff to pay the costs of one of the defendants, and to have them over again from another defendant, and that defendant to pay the plaintiff's costs; the plaintiff is not at liberty to issue more than one subpoena or more than one attachment for both sets of costs. *Semble*. [*Chute v. Ross*] - - - - - 255
9. Under the 17th Order of 1831, a plaintiff though he does not want a commission, is not at liberty to give a rule to pass publication until the expiration of three weeks from the service of the subpoena to rejoin. [*Flight v. Jones*] - - - - - 258
10. A defendant who was in contempt for want of answer, was brought up from the King's Bench Prison, under 11 Geo. 4, and 1 Will. 4 c. 36, rule 6, and turned over to the Fleet, and a counsel and solicitor were assigned him. He did not, however, put in his answer. Held that the bill could not be taken *pro confesso*, under rule 2d, until the defendant had been again brought up and remanded. [*Viscountess Barnewell v. Cooke*] - - - - - 320
11. The affidavit in support of a motion to extend the common injunction must be made by the plaintiff himself unless a sufficient reason is assigned for its not being so made. [*Spalding v. Keely*] - - - - - 377
12. The defendant, after having been taken on an attachment for want of answer, was rescued. The serjeant-at-arms was directed to go. [*Lewis v. John*] - - - - - 426
13. Persons not parties to a cause, but who have obtained leave to attend the proceedings in the Master's office, if they wish to except to the report, must present a petition stating their objections and praying for leave to except. [*Taylor v. D'Egville*] - - - - - 445
14. Where a subpoena has been served upon a defendant, resident abroad, and an appearance has been entered for him, under 4 & 5 Will 4, c. 82, the plaintiff may proceed to take the bill *pro confesso* against him for want of answer, in the same manner as if the subpoena had been served within the jurisdiction of the Court. [*Godson v. Cooke*] - - - - - 519
15. Where a plaintiff wishes to have an appearance entered for a defendant under 11 G. 4, and 1 W. 4, c. 36, rule 13, he must make a

- motion for that purpose. [*Pitman v. Lockyer*] - - - - - 528
16. Course of proceeding, to compel payment of a balance found due on taxation from a client to his solicitor. [*Stocken v. Dawson*] - - 547
17. Where a power is required to be exercised by a deed executed in the presence of and attested by witnesses, the deed by which the power is exercised, cannot be proved *vivâ voce* at the hearing of the cause. [*Brace v. Blick*] - - - - - 619
18. The steward of a manor, who was also a solicitor, ordered on the petition of the lord, in a summary manner, to deliver up the court rolls to the receiver in the cause. [*Rawes v. Rawes*] - - - - - 624
19. The plaintiff applied for a special injunction, *ex parte*, but the Court required him to give notice of the motion. After service of the notice, but before the day mentioned in it arrived, the answer was filed. On the motion being renewed, affidavits filed with a view to the *ex parte* application, were allowed to be read. [*Atkinson v. Kemble*] - - - 638
20. The Court will not alter its practice as to granting injunctions, notwithstanding the greater rapidity of proceedings at law in consequence of the new rules of 1834. [*Bailey v. Weston*] - - - - - 666
- See CERTIFICATE. — CONTEMPT. — DISMISSAL.—NEW ORDERS, 1, 3, 4, 5.—PROCESS, 1.—PROOF OF DEEDS.
- PRESENTATION.
- See ADVOWSON.
- PRO CONFESSO.
1. Motion by a defendant, against whom the bill might be taken liberty to petition refused, and, the same as against him, he which bill against him.
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2. Although ministers yet, if a dispute has been siastical having will pro

ceased, by granting an injunction and receiver pending the litigation in the Ecclesiastical Court. [*Ibid.*]

See REPRESENTATION.

PROCESS.

1. A messenger had been ordered to bring an infant defendant into Court, to have a guardian assigned for putting in his answer. The messenger's return stated that the infant was secreted by his mother. The Vice-Chancellor ordered the serjeant-at-arms to go; and said that, on the return of the serjeant-at-arms, he would order the senior six clerk to be appointed the guardian, without the infant being produced. [*Steed v. Calley*] - - - - 148
2. The defendant, after having been taken on an attachment for want of answer, was rescued. The serjeant-at-arms was directed to go. [*Lewis v. John*] - - - - 426
3. Where a plaintiff wishes to have an appearance entered for a defendant under 11 G. 4, and 1 W. 4, c. 36, rule 13, he must make a motion for that purpose. [*Pitman v. Lockyer*]

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See PRACTICE, 14.

PRODUCTION OF DOCUMENTS.

If a plaintiff has proved a document in a defendant's possession, the latter must produce it at the hearing although he has not been served with an order to that effect. [*Wheat v. Graham*] - - - - 61

PROMISSORY NOTES.

See CONSTRUCTION, 18.

PROOF OF DEEDS.

1. If the validity and not the execution of a deed is questioned in a suit, it may be proved *vivâ voce* at the hearing. [*Attorney-General v. Pearson*] - - - - 309
2. Where a power is required to be exercised by a deed executed in the presence of and attested by witnesses, the deed by which the power is exercised, cannot be proved *vivâ voce* at the hearing of the cause. [*Brace v. Blick*] - - - - 619

PUBLIC POLICY.

- A. provided a fund for defraying the expenses of obtaining an Act of Parliament to dissolve the marriage of B. and C. who was A.'s illegitimate daughter. Held that the transaction was not illegal. [*Moore v. Usher*] - - - - 384

See AGREEMENT, 3. 5.

PUBLICATION.

See NEW ORDERS, 2.

PURCHASE-MONEY.

See POWER OF SALE.

PURCHASER.

See MORTGAGOR AND MORTGAGEE, 4.

—POWER OF SALE.—VENDOR AND PURCHASER.

PURCHASER FOR VALUABLE CONSIDERATION.

A purchaser for valuable consideration who submits to answer, must answer fully. [*The Earl of Portarlington v. Soulby*] - - - - 28

RAILROAD SHARES.

Testator subscribed for 20 shares of 100*l.* each, in a projected railroad, and paid 5*l.* on each share, and covenanted to pay the remainder when called on. He bequeathed his personal estate to his widow, and devised certain of his real estates to a trustee, in trust to sell and pay all debts due from him on mortgage, or for the purchase of estates which he had contracted for, and all other just debts that should be due from him at his death. When he died, the shares were at a premium, and no further instalment on them had been called for. Two years afterwards, the Act for making the railroad passed. Held that the testator's personal estate, being exonerated from his debts, his widow was entitled to have the unpaid instalments paid out of the real estates. [*Blount v. Hipkins*] - - - - 51

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RAILWAY ACT.

1. An agreement not to oppose a railway bill in Parliament, is not illegal. [*Edwards v. Grand Junction Railway Company*] - - - - 337
2. The projectors of a railway, pending a bill in Parliament for incorporating them, made an agreement on behalf of the proposed corporation, in consequence of which a threatened opposition to the bill was withdrawn. Held that the corporation, having received the benefit of the agreement, were bound by it - - - - - [*Ibid.*]

Testator gave trees, in his function trustees, life, and for his trustees, to pay stock tax after his death as the child in such respect should male or begotten trees to

REAL ESTATE.

See CONVERSION.

and Bank stock, for such charitable or other purposes as they should think fit, without being accountable to any person; and he gave the residue of his personal estate and effects, wines, pictures, plate, books and furniture, to W. R. E. Held that the ultimate trust of the funded property and Bank stock, was not too remote, but was void for uncertainty; and that the residuary clause was general. [*Ellis v. Selby*]

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RENT.

See LANDLORD AND TENANT.—DEPOSIT.

REPORT.

See EXCEPTIONS.

REPRESENTATION.

A. died in India. B. one of his executors proved his will in India. B. died and C. his executor, proved his will in England. C. is not the personal representative of A. [*Twyford v. Trail*] - - - - - 92

RESIDENCE IN ENGLAND.

Testator, by his will, placed the son and daughter of his deceased son under the protection and trust of his trustees, and provided certain annual sums for their maintenance, until they attained 24, when each of them was to receive a legacy of 1,500*l.*; but if their mother should fix with her children out of England, their allowances were to be reduced: and, if the son did not remain in England under the protection of the trustees, he was to forfeit his legacy. The mother took her children to India during their in-

fancy, but returned to England four years afterwards. The son, having obtained a commission in the army, shortly after his return, joined his regiment in India. Afterwards, and whilst he was still under 21, he returned to England on account of illness, and remained there about three years, and then, having attained 21, he rejoined his regiment in India. Held that the son had incurred neither a forfeiture of his legacy, nor a reduction of his allowance. [*Schnell v. Tyrrell*] - - 86

RESIDUARY ESTATE.

See CONSTRUCTION, 15.

RESIDUARY GIFT.

See REMOTENESS.—WILL, 14.

RESIDUE.

1. Where an annuity for a term of years forms part of a residue, the executors, until they can sell it, must invest the payments, and the interest of the investments will belong to the tenant for life of the residue. [*Crawley v. Crawley*] 427
2. Where sums are set apart to answer contingent legacies, the interest of them, until the contingency happens, is part of the income of the residue. [*Ibid.*]
3. Where the interest of a legacy is directed to be accumulated beyond the legal period, the interest of the legacy and accumulations, after that period and until the time of payment, is part of the capital of the residue. - - - - - [*Ibid.*]

See CONSTRUCTION, 15.—REMOTENESS.

RESULTING TRUST.

See CONSTRUCTION, 17.

REVERSION.

1. A reversion in fee expectant on a life-estate, was settled in strict settlement, and the trustees were empowered, at any time thereafter, with the consent of the tenant for life under the settlement, to sell or exchange the lands for other lands, in fee in possession. The tenant for life in possession, together with the tenant for life under the settlement and the trustees, by their agent, sold the estate for one entire sum. The purchaser objected that the power of sale could not be exercised until the reversion came into possession, but waived all other objections. Held that the power was well exercised, and that the purchaser, having waived all other objections, must agree, with the vendors, as to the apportionment of the purchase-money between the life-estate in possession and the reversion, or that the apportionment must be made by the master. [*Clark v. Seymour*] - - - - - 67
2. The assignee of a reversion is not entitled under 32 Henry 8, c. 34, to arrears of rent which became due prior to the assignment. [*Flight v. Bentley*] - - - - - 149
3. A. was entitled, for the joint lives of himself and his father, to a rent-charge of 500 l. charged on an estate of which his father was tenant for life, with remainder to A. in fee. A. having agreed to sell to B. a perpetual rent-charge of 500 l. issuing out of the estate, assigned to B. the rent-charge to which he was so entitled, and conveyed his reversion in fee, to trustees, in trust, to secure to B. a rent-charge of 500 l. a year,

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after reciting that he had given the Penty Park estate to J. L., he revoked the said Penty Park estate and gave it to J. P.; and, after further reciting that he had given the said Coedllys estate, in his will, to J. P., he revoked the said bequest, and gave the said Coedllys estate to J. L. Held that all the limitations in the will, of the two estates were revoked, and that J. P. took Penty Park in fee, and J. L. Coedllys in fee. [*Philipp v. Allen*]

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2. Testator, by his will, gave all his property to his wife, absolutely. By a subsequent incomplete testamentary paper, he gave all his property to his wife and two other persons, in trust to sell and pay the interest of the proceeds to his wife for her life, and, after her decease, to dispose of the principal to the purposes after mentioned. The testator then gave several legacies and annuities, and directed that, after the death and failure of issue of one of the annuitants, the annuity should be paid to his residuary legatee, but he did not name any. In another testamentary paper, the testator gave legacies and annuities to the legatees and annuitants named in the former paper, and also to other persons. Held that the three papers formed, together, the testator's will: that the bequest to the wife in the first paper, was not revoked except so far as was necessary to provide for the legacies and annuities: and that the legacies given by the second and third papers, were single and not cumulative. [*Brine v. Ferrier*]

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See CONSTRUCTION, 10.

RIGHT OF PRESENTATION.

See ADVOWSON.

SALE.

See COSTS, 8.—INFANT, 6.—REVERSION.

SALE UNDER DECREE.

- A purchaser under a decree, agreed to sell the lots he had purchased, to A. and died, his heir being abroad. Ordered that A. should be substituted for him as the purchaser, and should be at liberty to pay the purchase-money into Court and be let into possession. [*Pearce v. Pearce*]

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See INFANT, 6.

SEAL DAY.

See COMMITMENT.

SECRET TRUST.

See FRAUD, 2.

SECURITIES.

See CONSTRUCTION, 16. 18.—TRUSTEE, 1.

SEPARATE REPORT.

See EXCEPTIONS, 2.

SEPARATE USE.

- Testator gave his residuary estate to Louisa M. and Ann M., share and share alike, for their own use and benefit, independent of any other person. Held that they were entitled to their shares for their separate use. [*Margetts v. Barringer*]

482

See FEME COVERT, 1, 2.—HUSBAND AND WIFE, 2.

SERGEANT-AT-ARMS.

See INFANT, 3.—PRACTICE, 12.

SETTLEMENT.

1. By a marriage settlement, a fund, the property of the wife, was settled on her and her husband and their issue, and, in default of issue, on the wife's next of kin. The wife, who was illegitimate, died without issue, and her husband administered to her. Held that the Crown was not entitled to the fund; but that it belonged to the husband as administrator to his wife. [*Hawkins v. Hawkins*] - - - - - 173

2. Property agreed to be settled, consisted of leaseholds in possession, and of money to be received on the husband's death, which was to be invested in the usual securities, and the trustees were to stand possessed of the leaseholds in trust for the husband for life, and, after his death, of one moiety of the leaseholds, stocks, funds and securities, for the wife for life, in case she survived her husband, and of the other moiety of the leaseholds, stocks, funds and securities after the husband's death, and of the whole of the stocks, funds and securities, after the wife's death, in trust for the children. The wife died in the husband's lifetime. Held that there was a resulting trust, as to the leaseholds, for the husband, the settlor. [*Wilson v. Paul*] - - - - - 620

See PORTIONS.—REVERSION, 1.

SHARES.

See DEBT

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1. A marriage property, undertook separate suit insti bills were the separ referred *Semble*, t to the cos than one- ray v. Be

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to invest two sums of 600*l.* in their names, for his daughters for life, and, after their deaths, for their children. A. and B. alone acted. A. paid the interest of the two sums to the daughters, but did not invest the principal. B. executed a mortgage to A. and C. for securing 1,300*l.* part of the testator's estate possessed by him, and died. His executors paid off the 1,300*l.* and A. and C. joined in assigning the mortgage to them and in signing a receipt for the money. A. died having executed a deed-poll, reciting that the testator gave all his personal estate to A. B. and C. upon certain trusts mentioned in his will, and acknowledging that A. had received the whole 1,300*l.*, and that C. joined in the assignment and receipt, for conformity only. Held that, under the deed-poll, the *cestui que trusts* of the two sums of 600*l.*, were specialty creditors of A. [*Turner v. Wardle*] - - - - 80

SPECIFIC PERFORMANCE.

See AGREEMENT.

STATUTE OF LIMITATIONS.

If an equitable mortgagee enters into the receipt of the rents of the mortgaged estate, such receipt is, *prima facie*, a payment within the meaning of the proviso in the Statute of Limitations. [*Brocklehurst v. Jessop*] 438

STATUTE OF 4 & 5 WILL. IV. c. 29.

The 3d section of 4 & 5 Will. 4, c. 29, enacts that, in certain cases, loans on real securities in Ireland, shall be made under the direction of the Court of Chancery or Exchequer in

England, to be obtained in any cause upon petition in a summary way. Held that the concluding part of the section must be read thus: "in any cause, or, upon petition in a summary way;" and that the proposed securities must be approved of by the Master. [*Ex parte French*] - - - - - 510

STEWARD OF A MANOR.

The steward of a manor, who was also a solicitor, ordered on the petition of the lord in a summary manner, to deliver up the court rolls to the receiver in the cause. [*Raines v. Raves*] - - - - - 624

SUBPENA.

See COSTS, 4:

SUPPLEMENTAL ANSWER.

The plaintiff claimed a share of an intestate's estate under the Statute of Distributions. The defendant, after filing his answer, discovered that the intestate was domiciled in Java. Leave given to file a supplemental answer for the purpose of stating that fact. [*Tidnell v. Bouyer*] - - - - - 64

SUPPLEMENTAL BILL.

After decree, one of the defendants became insolvent, and his assignee, without notice to the plaintiff, filed a supplemental bill against all the parties to the suit. Afterwards the plaintiff filed a supplemental bill against the assignee alone. A motion, by the assignee, that the plaintiff's supplemental bill might be taken off the file, for irregularity, was refused. [*Philpotts v. Clark*] 231

TAXATION.

See COSTS OF TAXATION.—PRACTICE, 13.

TENANT FOR LIFE AND
REMAINDER-MAN.

1. Testatrix devised an estate to a trustee in trust to settle it on A. for life, with power to cut timber for repairs only, remainder to B. for life *sans* waste, remainder to his first and other sons in tail. The trustee, under a surveyor's advice, and with the consent of the tenants for life, ordered timber on the estate to be felled, and invested the proceeds in the purchase of stock in his own name. Held that A. was entitled to the dividends of the stock for her life. [*Waldo v. Waldo*]

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2. Where an annuity for a term of years forms part of a residue, the executors, until they can sell it, must invest the payments, and the interest of the investments will belong to the tenant for life of the residue. [*Crawley v. Crawley*] 427

3. By a marriage settlement, some shares in the London Assurance Company, were settled on the husband and wife for their lives, and after their deaths, on their children: and it was provided that, if any bonus should be given by way of increase of capital of the trust-funds, it should be added to the capital: but, if it should be given by way of interest or dividend, it should be paid to the person entitled to receive the dividends of the trust-funds for the time being. At a meeting of the company, the usual

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TRUST

1. Testator

the expiration of three years after his death, to pay 10,000 *l.* (which he charged on an estate devised to his son, one of the trustees) to his daughter's husband, on condition that he should, to the satisfaction of the trustees, give to them the best and most sufficient security in his power, so that the 10,000 *l.* might be effectually secured to them upon certain trusts for the testator's daughter and her children. The son paid the money to the husband, before the expiration of the three years, and the trustees took a bond for securing it. Held they were justified in anticipating the time of payment, but not in taking the bond. [*Mills v. Osborne*] - - - 30

2. Preparatory to the final winding-up of a trust, the agent and solicitor of the trustee paid the trust-money to his bankers, to the credit of his general account with them, and informed the *cestui que trust*, that the money was lying idle at his bankers. The *cestui que trust* took no notice of the information; and, more than a month afterwards, the bankers failed. Held that, as the agent did not inform the *cestui que trust* that the money had been paid to the credit of his general account, and as the payment to the bankers was not necessary to the winding-up of the trust, the agent and the trustee were jointly liable for the money. [*Macdonnel v. Harding*] - - 178

See BREACH OF TRUST.—COLLUSION.

TRUST FUND.

See BONUS.

TURNPIKE SECURITIES.

See WILL, 14.

UNCERTAINTY.

Testator gave his Bank stock to trustees, in trust for F. B. for life, and his funded property to the same trustees, in trust for W. R. E. for life, and, after his death, in trust for his issue; and he directed the trustees, after the decease of F. B., to pay the dividends of his Bank stock to W. R. E. for life, and after his decease, to apply the dividends and capital for the benefit of the children or child of W. R. E., in such manner as he had directed respecting his funded property; and, should W. R. E. die without issue male or female of his body lawfully begotten, then he directed the trustees to apply his funded property and Bank stock, for such charitable or other purposes as they should think fit, without being accountable to any person; and he gave the residue of his personal estate and effects, wines, pictures, plate, books and furniture, to W. R. E. Held that the ultimate trust of the funded property and Bank stock, was not too remote, but was void for uncertainty; and that the residuary clause was general. [*Ellis v. Selby*] 352

UNDERVALUE.

See VENDOR AND PURCHASER, 5, 6.

VENDOR AND PURCHASER.

1. In 1828 A. a trader, conveyed his estates and certain monies due to him, which were, substantially, the whole of his property, to trustees in trust to sell, &c., and pay his creditors. In 1830 the trustees sold part of the estates to B., and A. joined

- with the trustees in the conveyance to B. In 1833 B. sold the purchased premises to D. who objected to the title, on the ground that the conveyance of 1828 was an act of bankruptcy. No commission, however, had issued against A. Held that the conveyance to B. was protected by the 86th sect. of the Bankrupt Act. [*Earl Granville v. Dawsons*] 121
2. If a vendor who knows that the purchase-money is trust money, suffers one of the trustees to retain part of it, without the knowledge of the co-trustees or the *cestuis que trust*, he has no lien on the estate for the part so retained. [*White v. Wakefield*] - - - - - 401
3. Where a vendor signs a receipt for the whole purchase-money, but suffers the purchaser to retain part of it, and remains in possession of the estate as tenant to the purchaser; his possession is no notice to a subsequent purchaser or incumbrancer of his lien on the estate for the sum retained. - - - [*Ibid.*]
4. A mortgagee purchased part of the mortgaged estate. His principal and interest, calculated up to the 24th of March, exceeded the purchase-money. He was let into possession from the preceding Christmas. [*Bates v. Bonner*] - - - - 427
5. A. was entitled, for the joint lives of himself and his father, to a rent-charge of 500 *l.* charged on an estate of which his father was tenant for life, with remainder to A. in fee. A. having agreed to sell to B. a perpetual rent-charge of 500 *l.* issuing out of the estate, assigned to B. the rent-charge titled, a in fee, to to B. a r to comm the prio the trans dered as version, agreeme secure to of 500 *l.* [*Carter*]
6. In deten has been terest, th actuary's garded.
7. A. sold der copy for the On the r made. sold and the copy for the t only; ar ed to C covenant forced a they ran entitled name. |
- See AGE OF
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the same trustees for 500 years, remainder to the sons of the marriage in tail. The trusts of the term were, in case the husband should die leaving issue, by the wife, a son who should attain 21 and one or more other children, to raise, after the deaths of the husband and wife and the commencement of the term, but not before, unless the husband should so direct, (there being a son then living) a certain sum for the portions of such other children, share and share alike, and to survive to the survivors and survivor of them, the shares to be paid to them on attaining 21, (if sons) or 18 or marrying (if daughters) which should first happen, in case it should so happen, after the deaths of the husband and wife, otherwise, within three months after the death of the survivor of the husband and wife. Provided that if the husband should, in exercise of a power given to him by the settlement, appoint the estate to a younger son, then the elder son should be entitled to a share of the sum to be raised for portions. Provided also that, until the portions should become payable, the trustees should, out of the rents of the premises comprised in the term, and after the commencement thereof, maintain the children: and that the husband and wife, during their respective lives, and the trustees, during the joint lives of the husband and wife and during the term, should have power to lease the premises for 14 years. There was issue of the marriage a son and three daughters, all of whom attained the required age, and all but one daughter survived the husband and wife. Held

that that daughter was not entitled to a portion. [*Whatford v. Moore*] - - - - - 574

VICAR.

See LEASE.

VIVA VOCE PROOF.

See PROOF OF DEEDS.

VOLUNTARY DEED.

A father being seised of estates in tail and in fee, on his daughter's marriage, covenanted with two trustees, one of whom was his son, to pay an annuity to his daughter, out of the rents and income of his real and personal estates, and, by deed or will, to settle an estate of 200 l. a year, or, at his own election, 4,000 l. in lieu of it, on certain trusts for the benefit of his daughter and her husband and their issue. By a subsequent deed, the father and son, no other person being a party, agreed to suffer a recovery of the entailed estates and to sell them and also the fee simple estates, and that, out of the proceeds, the father's debts (for some of which the son was surety) should be paid, and that certain sums should be taken by the father and son, for their own use, and that 4,000 l. should be paid and provision made for the annuity, pursuant to the covenant on the daughter's marriage. A recovery was accordingly suffered, and the estates were limited to the father and son in fee. The father and son afterwards agreed to abandon the last-mentioned agreement, and, in consideration of the son covenanting

to pay the father's debts, the estates were conveyed by them to the son in fee. The son afterwards mortgaged the estates comprised in the recovery. Held that the covenant for payment of the annuity, created a charge on the estates, and that, the mortgagee having had notice of that covenant, the premises were subject to the annuity; but that the covenant to settle the estate or 4,000 *l.* in lieu of it, created no lien or charge on any of the father's estates, and that the subsequent agreement between the father and son was merely voluntary and was fairly abandoned by them. [*Ravenshaw v. Hollier*] - - - - - 3

VOLUNTEER.

See GIFT.

WARD OF COURT.

See INFANT, 2, 3.

WAREHOUSEMAN.

See INTERPLEADER, 4.

WHARFINGER.

See INTERPLEADER, 4.

WILL.

1. Testator by his will gave to his son a legacy of 3,000 *l.* and, by a codicil, a legacy of 4,000 *l.* in addition to the legacy of 2,000 *l.* given by his will. Held that the son was entitled to the legacy of 3,000 *l.* in addition to the legacy of 4,000 *l.* [*Gordon v. Hoffman*] - - - - - 29
2. Testatrix bequeathed as follows: "I give the legacy of 4,000 *l.* to A., and in case of his decease, I give the same legacy to his wife, and, at her

decease,
Held that
the testatrix
to the

3. Testator's articles provided that he ment certain free from the bequest which he purchased he devised to A. B. the proceeds of his funeral expenses, gages of his wife, and all and all next place to be paid difference due to the sole executor's debts.

4. Testatrix bequeathed the child thereof to live to such of that age as she might have at her decease child or dying or dying and leaving surviving under 21. The testatrix who attained

5. Testator, by his will, placed the son and daughter of his deceased son, under the protection and trust of his trustees, and provided certain annual sums for their maintenance, until they attained 24, when each of them was to receive a legacy of 1,500 *l.*; but if their mother should fix with her children out of England, their allowances were to be reduced: and, if the son did not remain in England under the protection of the trustees, he was to forfeit his legacy. The mother took her children to India during their infancy, but returned to England four years afterwards. The son, having obtained a commission in the army, shortly after his return joined his regiment in India. Afterwards and whilst he was still under 21, he returned to England on account of illness, and remained there about three years, and then, having attained 21, he rejoined his regiment in India. Held that the son had incurred neither a forfeiture of his legacy, nor a reduction of his allowance. [*Schnell v. Tyrrell*] - 86
6. Testator gave a real estate and a sum of stock. to A. for her life, and, after her death, to his brother, absolutely: and he gave legacies, which he directed to be paid as soon as convenient after his death, to his nephews and nieces, and the residue of his property to his brother absolutely. The brother having died, the testator, by a codicil reciting that fact and that thereby the devises and bequests to his brother had lapsed, gave an annuity to his brother's widow, and directed his trustees to pay the income of the residue of his personal estate to A. for life, and gave to her all his real estates for life, and, after her death to his trustees in trust to sell, and the proceeds to fall into his personal estate: he then gave 10,000 *l.* to each of his nieces, in addition to the legacies given to them by the will, and directed that that sum for each of them, should be held by his trustees for their separate use: and he gave all the clear residue of his estate, after providing for the before-mentioned legacies and also those given by his will, to his nephews. Held that the legacies given to the nieces by the codicil were not payable till after A.'s death. [*Overend v. Gurney*] 128
7. Testator gave a sum of money to trustees, in trust only and for the use and benefit of his adopted daughter, and which he desired might be paid to her, and to be settled on her during her life, in case of her marriage: or, in case she did not marry, then the interest of the money, being vested in Government securities, to be paid to her: and, in the event of her not marrying or dying, then the money to go to his nephews. The daughter married, and, shortly afterwards, died without issue. Held that her husband, who had taken out administration to her, and not the testator's nephews, was entitled to the fund. [*Hawkins v. Hawkins*] 173
8. Testator bequeathed his personal estate to his wife, for life, and, after her death, to a trustee, in trust to pay the rents and profits of his personal estate, for and towards the support and maintenance of his six nephews and nieces, and in case of the

- death of any of them, for the maintenance and support of the survivors. All the nephews and nieces survived both the testator and his widow. One of the nieces then died. Held that her share did not become undisposed of, but that she, by surviving the testator's widow, had become absolutely entitled to it. [*Clarke v. Gould*] - - - - - 197
9. Testatrix bequeathed her residuary estate to trustees, in trust to pay and divide the interest between her two nieces, equally, during their lives, and, after their deaths, to pay and divide the principal, unto and amongst the lawful issue of her said nieces, or of such of them as should leave issue, equally, *per stirpes* and not *per capita*; and, in default of such issue, to pay the interest to certain other persons, for their lives, &c. One of the nieces died, having had seven children, five only of whom survived her. Held, that those five became entitled, on their mother's death, to her moiety of the residue. [*Cross v. Cross*] - - 201
10. Testator bequeathed a sum of stock to A. and B., for their lives, and, on their deaths, to their children then living who should attain 21, with a gift over to the survivor of A. and B. in case the children of either of them should die under 21. A. died leaving a child who had attained 21. B. afterwards died without having had a child. Held that A.'s personal representatives were entitled to B.'s moiety of the stock. [*Aiton v. Brooks*] - - - - - 204
11. Testator directed his trustees to invest such a sum as would produce 40*l.* a year and to pay the same to his daughter transfer legatees: daughter he revoke to his daughter 500*l.* that as the sum given for life, it was [*Pilcher v.*
12. Testator estate to case they leaving is A. and the or unto such their right the death out issue: of whom the will the other the will, Held that were living testator's issue, or the two y participat v. *Pennin*
13. Testator estate to of the proceeds the funds daughter death, for failure of the capital due. By had, by the trustees, interest, 4,000 ing in his desirous

executed by three persons, he appointed another person to be a co-trustee and guardian of his granddaughter jointly with the two named in his will; and he directed that his said trustees should transfer the said stock to his granddaughter, free from all deductions. Held that the testator did not intend to give 4,000 *l.* stock to his granddaughter absolutely, but merely that the trusts declared by his will of the 4,000 *l.* should be performed by three persons instead of two. [*Barry v. Crundall*] - - - 430

14. Testator gave all his freehold and leasehold messuages, lands and hereditaments, ready money, securities for money, stock in the public funds, goods, chattels and effects, and all other his real and personal estate and effects, to trustees, in trust to pay the rents of his freehold and leasehold estates, and the dividends, interest and proceeds of his money in the funds and other his said personal estate, to his daughter for life, and, after her death, to stand possessed of his said freehold and leasehold estates, money in the funds, and all other his said real and personal estate, for the children of his daughter: and, in default of such children, in trust to pay the rents of his said freehold and leasehold estates, and the dividends, interest and proceeds of his said stock in the funds and other his said personal estate, to his nephews, for their lives, and, after their deaths, in trust to stand possessed of his said freehold and leasehold estates, money in the funds and other his said personal estate, for their children; and, in default of such chil-

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dren, he gave his said freehold and leasehold estates, stock in the public funds and all other his said real and personal estate, to the corporation of S., in trust, as soon as conveniently might be after they should come into possession thereof, to sell his said freehold and leasehold estates, and also to sell, call in and convert into money his said stocks in the public funds and all other his said personal estate, and to lend the same to certain persons upon the terms therein mentioned. The testator, at the date of his will and at his death, was possessed of leasehold estates, turnpike securities, bank stock, and other personal estate. Held that the bequest to the trustees was a general residuary bequest, and that the leaseholds and Bank stock ought to be sold, and the proceeds invested in Three per Cents.; and an inquiry was directed, whether the turnpike securities were real and permanent securities. [*Mills v. Mills*] - - 501

15. Testator devised a freehold estate to his wife for her widowhood, remainder to his nephew for life, remainder to the children of his nephew in fee as tenants in common, and, if there should be no child of his nephew living at his wife's death, or second marriage, then over; and by a codicil of even date with the will, he directed that neither his nephew nor any issue of his nephew should take a vested interest by virtue of his will, unless they should respectively attain 21; and that, in case of the death of any of such children under 21, their shares should go to the survivors, on their attaining 21. The

nephew attained 21, and had five infant children living at the widow's death. Held that their interests were contingent on their attaining 21. [*Russel v. Buchanan*] - 628

16. Testatrix bequeathed to her niece, her pictures and her collection of coins (except those of the two last and present kings) in and about her dwelling-house; and all the residue of her estate, both real and personal (except as after otherwise disposed of) she gave to her grandchildren; and she directed that, from and after the day of her interment, all the property over which she had any disposing power, in and about her dwelling-house (except what she had otherwise given) should belong to her niece, and not be subject to diminution except by her own personal act and authority. After the testatrix's death, guineas and sovereigns, Bank of England, country bank, and promissory notes and a mortgage, to a large amount in the whole, were found in her house. Held that the niece (notwithstanding an annuity and a sum

in gross will) was and sovereign of England country or the mo

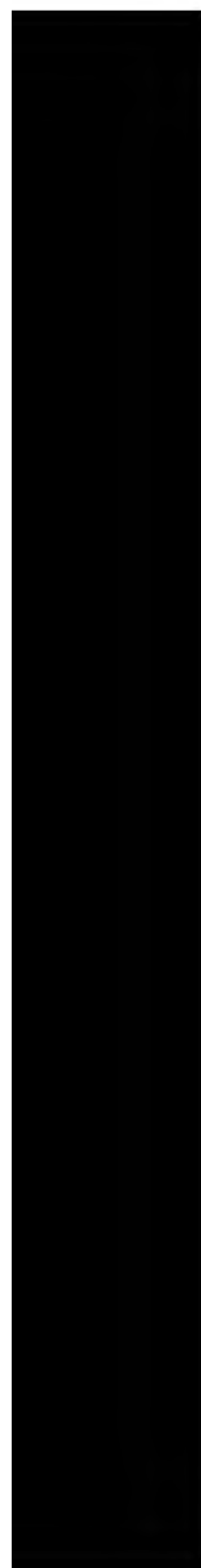
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1. The evidence may under 3 and 27.
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